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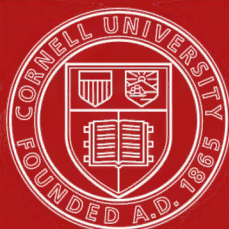
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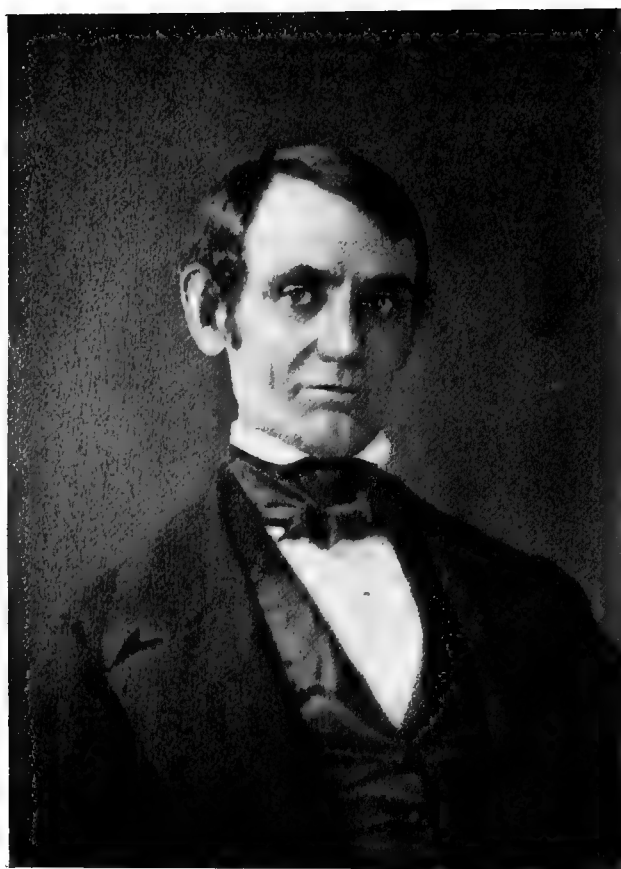


# GREAT AMERICAN LAWYERS









## ABRAHAM LINCOLN

From a photograph taken during the period of his leadership of the Springfield Bar, first published in a life of Lincoln by Ida M. Tarbell, McClure, Phillips & Company, New York, and here reproduced by permission.



# Great American Lawyers

The Lives and Influence of Judges and  
Lawyers Who Have Acquired Perma-  
nent National Reputation, and Have  
Developed the Jurisprudence of the  
United States.

A HISTORY OF THE LEGAL PROFESSION  
IN AMERICA

EDITED BY  
WILLIAM DRAPER LEWIS  
of the University of Pennsylvania  
Dean of the Law Department

VOLUME V

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From a photograph taken during the period of his leadership of the Springfield Bar, first published in a life of Lincoln by Ida M. Tarbell, McClure, Phillips & Company, New York, and here reproduced by permission. . . . *Frontispiece*

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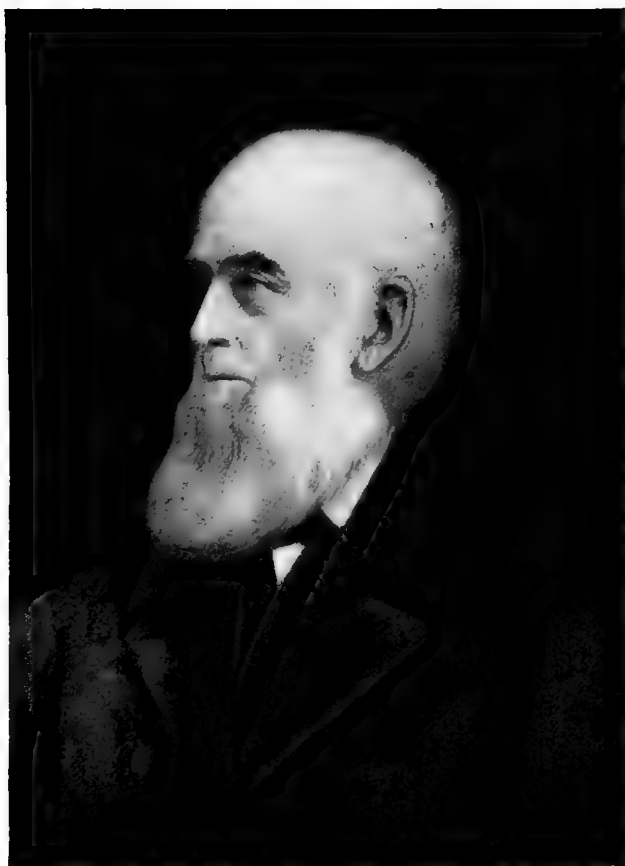
**ISAAC FLETCHER REDFIELD.**



ISAAC FLETCHER REDFIELD

From a painting by A. H. Bricknell, 1871, in the State House at  
Montpelier, Vermont.







# ISAAC FLETCHER REDFIELD.

1804-1876.

BY

WILLIAM BRUNSWICK CURRY STICKNEY,

*of the Vermont Bar.*

**I**SAAC FLETCHER REDFIELD was born at Weathersfield, Windsor County, Vermont, April 10th, 1804. He was the son of Dr. Peleg Redfield and Hannah (Parker) Redfield. His mother, the daughter of Isaac and Bridget (Fletcher) Parker, was born at Milford, Massachusetts, November 17th, 1785. His father removed to Vermont in March, 1803, settling in Weathersfield, whence he moved in June, 1805, to Coventry, in Orleans County, where he purchased lot No. 44 on the eastern border, made a clearing, and built a house. He was vigorous, forcible, resolute, skilled in his profession, of good business ability, and interested in public affairs. He represented Coventry in the General Assembly at its annual sessions from 1812 to 1820, and was a member of the Constitutional Convention of 1814.

Twelve children were born to them, six sons, and six daughters, of whom Isaac Fletcher was the first. Timothy Parker, a younger brother, was distin-



guished for his talents, learning and ability in the legal profession, and was Judge of the Supreme Court of Vermont from 1870 until his voluntary retirement in 1884.

Mrs. Redfield was a woman of unusual culture and refinement, whose influence was felt by her children, and especially by her eldest son, whose devotion to his mother, and deference to her views and wishes were constant throughout his life, and afforded a living evidence of his tenderness and strength, which he inherited from her.

He was determined to go to college, and both his parents encouraged him to do so. After a preparatory school training of eight months, he entered the freshman class at Dartmouth eight months in advance, and graduated with honor in 1825. During his college course he supplied himself with funds for his expenses principally by teaching, and by making and selling maple sugar in the spring of the year. He afterward commented upon the fun his fellow collegians made of the cowhide shoes he wore, and would say, "They were good-natured fellows, though; if they had known my shoes were the best I could afford, they would not have spoken of them."

He was admitted to the bar of Orleans County in 1827, and practiced at Derby eight years, the last three of which he was States Attorney of the county.

While studying law, he devoted himself to the learning of special pleading, and so, upon his admission to practice, he found immediate lucrative em-

ployment in drafting pleas for his professional brethren of more experience and larger clientage than himself and of much less skill.

In 1834 he was admitted to the bar of the United States Supreme Court, upon motion of Daniel Webster, Chief-Justice Marshall presiding.

His practice in 1835 was well established and it was with reluctance that in October of that year he consented to the presentation of his name to the Governor and Council and General Assembly as candidate for the office of Judge of the Supreme Court. He was elected, and from 1835 to 1860 when he removed from Vermont, he was annually elected a member of the Court, and for the last eight years Chief Judge.

From 1857 to 1861 he was professor of Medical Jurisprudence in Dartmouth College, having succeeded the Honorable Joel Parker.

He received the degree of Doctor of Laws from Trinity College, Hartford, in 1849, and from his alma mater, in 1855. In 1861 he removed to Boston, where he lived from that time until March 23d, 1876.

He was associate editor of the American Law Register from 1861 to 1876. And in 1867 and 1868 he was appointed special counsel for the United States, in connection with the Honorable Caleb Cushing, to look after the interests of the United States Government in property that had belonged to the Confederate States, at the close of the war, at-

tending to the delicate duties of this commission in England and France with marked success.

After leaving the bench he devoted himself with the above exception, to Chamber practice, and his duties as a writer; publishing works upon Railways, Wills, Civil pleading and practice, and Carriers and Bailments, besides editing Greenleaf's Evidence, and Story's Equity Jurisprudence and Conflict of Laws, Agency and Equity Pleadings, a collection of Leading American Railway Cases, with notes, and another of American Leading Cases on the Law of Wills, with notes; also in connection with Mr. M. M. Bigelow, a collection of leading American Cases on the law of Bills of Exchange, Promissory Notes, and Checks, with notes.

March 23d, 1876, after a brief illness, he died at his dwelling house in Monument Square, Charlestown.

Judge Redfield was a communicant of the Protestant Episcopal Church, and influential in its councils.

He was twice married; first to Miss Mary Smith of Stanstead, Quebec; and afterwards to Miss Catherine Clark of Saint Johnsbury, Vermont, who with a son, Luther Clark Redfield, since deceased, survived him. He had several other children, who died before him.

To those whose privilege it was to come into intimate association with Judge Redfield, his life was an inspiration. He was courteous, gentle, kind, loving

and of unfailing loyalty. His manners were refined and dignified. His conversation was varied, always interesting, at times quaint and humorous, again elevated and instructive.

Such is the brief record of a life of wonderful activity, of unwearied industry, of marked achievement, of spotless integrity, and Christian humility.

Judge Redfield, with his ability and intelligence, was conscious of his own strength, moral and intellectual, but his exercise of his faculties was controlled by a sense of responsibility for their proper use, and an acknowledgment of the rights of others, which at times appeared almost like diffidence.<sup>1</sup>

More than three-quarters of his active professional career in Vermont was passed upon the bench, as judge of the highest court of the state. His associates, at his first election, were Charles K. Williams, Chief-Judge Stephen Royce, Samuel S. Phelps, and Jacob Collamer, of whom it is said by the late Mr. E. J. Phelps in his graceful sketch of Judge Redfield,<sup>2</sup> "It is not too much to say that the Court thus formed has never been surpassed in this country."

In 1852 Judge Redfield succeeded Judge Royce,

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<sup>1</sup> His remarks, in holding a gentleman of the profession answerable for insulting talk to a justice of the peace, are evidence of his disposition and self restraint in judicial proceedings.

"There is ground for difference of opinion whether in this country with our free notions in regard to speech, perfect judicial respect can be practically better secured by strict enforcement of legal penalties, than by forbearance, and endurance, within certain reasonable limits." *In re Cooper*, 32 Vermont Reports, 253, 264.

<sup>2</sup> Published in the 49th volume of the Vermont Reports.

as Chief-Judge, and was eight times unanimously elected to that office, although during all the time of his tenure of office a large majority of the elective body was opposed to him in politics.

To appreciate fully the worth of his services as judge, and their real character it is necessary to understand somewhat the conditions and situation of Vermont jurisprudence at the time of his first election. The judiciary system and court procedure then in existence had prevailed for about eleven years. At the beginning of that period, there were, in 1824, one chief judge and two associate judges of the Supreme Court, but the business of the courts from inevitable causes, had so accumulated that it was complained that the judges with "the most unre-mitted industry could not accomplish more than half the business in most of the counties."<sup>3</sup> Reports of decisions had been occasionally published by individual enterprise, but not until October, 1823, had the legislature ordained the appointment of a reporter. The number of Supreme Court judges was increased to four in 1825 and to five in 1828. As to authorities, there had been some change from the conditions described by Chief-Justice Chipman in 1792, when he said that, "While former decisions rest only on the memory of the judge, overburthened in the term, and perplexed with a multiplicity of causes; or in the memory of counsel frequently under powerful bias, in the recollection and statement,

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<sup>3</sup> See preface to D. Chipman's Reports, 34.

little assistance in establishing uniform principles can be expected from precedents."

In such circumstances the judge of the earlier part of the nineteenth century, in a new and sparsely settled, but thrifty and growing community like Vermont, was forced to seek and master "a knowledge of the principles upon which precedents are founded and the true reason of their application," rather than the knowledge of precedents only; "satisfied that although the latter may serve to form the mere technical lawyer; the first leads to the fountains of justice, the existing relations of nature in society, and connects the principles of law with the true principles of morality."<sup>4</sup>

Such investigation was to be applied to the necessities of Vermont. Outside precedents were not favored. In *Rhodes vs. Risley*, the Court had said:<sup>5</sup> "Kirby's reports are not to be cited as an authority here, nor are the determinations of Courts in other states, but you may cite their reasons." And in the decision of the cause the Chief-Justice, Nathan Chipman, says:

I shall not feel myself bound by foreign precedents, but by the principles of the common law, which are the principles of common justice *as they apply to the general circumstances and situation of this commonwealth*. . . . It is well known that the maxims and precedents of the English laws do not apply in all cases. . . . It becomes necessary, therefore, to investigate principles and establish precedents for ourselves.

<sup>4</sup> N. Chipman, Preface to Dissertations.

<sup>5</sup> 1 Nathan Chipman's Reports, 84.

Our situation in Vermont was then as now peculiarly adapted to democratic institutions. We had and have no large cities, there is neither vast wealth nor abject poverty amongst us. Our people are highly intelligent, and well educated, and there was at that time but a slight admixture of foreign population. Individual independence is enforced by the provisions of our constitution<sup>6</sup> and by the same provision it is recognized that public service to the prejudice of one's private affairs shall command a just, but not extravagant compensation.

There was a settled jealousy against professional office holders, and at the same time a realization of the necessity of a learned and independent judiciary. The election of judges of the Supreme Court was vested in the Governor and Council and General Assembly by the Constitution of 1786, and again by that of 1793. There had been some usurpation by the legislature, of judicial authority, which the council of censors, whose duty it was to watch and report upon legislative action had severely condemned. As to the judiciary, they considered that in the infancy of the state "men could not be found the most capable and fit to be placed permanently in office," and emphatically expressed their disapproval of "the error of electing persons to judicial offices during good behavior," as it invested them with estates in their offices of which they could not legally be deprived, except by judicial proceeding for malad-

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<sup>6</sup> Chapter 2, sec. 25.

ministration. Consequently the constitutional term of judicial office was annual, but by the selection of men whose services demonstrated their adequacy, the actual tenure was more stable.

The general reluctance to hazard the doubtful experiment of granting a longer term, the great excellence of the chief appointments under the plan adopted, and the natural disposition of the people to become attached to a frame of government which has worked beneficially, contributed to perpetuate the system of election of judges by the legislature for terms corresponding to the legislative.

In the beginning of the nineteenth century Vermont precedents were meager. At the time of Judge Redfield's election in 1835, they were to be found in fifteen volumes of reports, covering the decisions from 1789 to 1834, only twenty-five being decisions rendered prior to 1800. They contained, however, the opinions of such lawyers as Nathaniel Chipman, Richard Skinner, and Samuel Prentiss, of whom it might be said, as of Judge Redfield himself, that every case submitted to their judgment was carefully and thoroughly considered, omitting nothing which could have any bearing upon a proper conclusion of the cause. The decisions of such judges "are not the mere discussion of theoretical principles, or the enunciation of abstract conclusions, but contain that practical application of legal truth to the affairs of life, and the cause of justice, in the success of which the law and the judge find their true test, and their



only substantial value.”<sup>7</sup> For it is the province of a judge to decide causes, not arbitrarily, but by so applying the law to the facts admitted or proven, that the uniform application of the principles involved in the decided cause to kindred causes, will command the support and approbation of the community as just and reasonable.

Such a judge was Isaac F. Redfield, and the story of his accomplishments for his state and for law and justice wherever the common law prevails, is contained in the Reports of his decisions. They are to be found in the volumes of Vermont Reports from the 8th to the 33d, inclusive. He brought to his high office, profound learning, keen observation, comprehensive wisdom, and a clear and incisive perception of all matters submitted to his judgment. It was his constant effort to apply himself with the aid of his associates, to building up a general system of law adapted to the circumstances of Vermont, and at the same time to treat with absolute justice the case before him. His methods were straight and straightforward; as he says, in *McCollum vs. Hinckley*:<sup>8</sup>

We should always be ready to march directly up to the object which we would attain, and this is done in some sense, to avoid circuity of action. But it was never before heard that a Court of Chancery would adopt a circumgyration in motion, in order to come at that indirectly which they otherwise could not reach.

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<sup>7</sup> E. J. Phelps, in the 49th volume of Vermont Reports.

<sup>8</sup> 9 Vermont Reports, 143, 148.

He appreciated and recognized the force of any argument fairly applicable to the cause. *Smith vs. Benson*,<sup>9</sup> was an action of ejectment for a parcel of land, part of a tract owned in common and conveyed by a tenant in common by metes and bounds, without the consent of his cotenant. In holding the conveyance void, the Court, Judge Redfield, says:

We know the argument *ab inconvenienti* is one not very difficult to be had, in a science composed of difficulties and doubts, and therefore not an argument of much weight in most cases. But in the present instance, it does seem not a little perplexing to resist its force. If one tenant in common is to be permitted to convey his portion of the estate by separate parcels to more than one he may to any number. And if these conveyances are valid the cotenant is bound to make partition with each of these separate grantees, and an estate which originally was valuable, with the right to compel partition with one only, becomes wholly worthless, from the obligation to submit to perpetual subdivision.

In announcing his decisions he was unsparing in his denunciation of wrongdoing, whatever the effect of his judgment. In *Dixon vs. Olmstead*,<sup>10</sup> an action to recover back property given by the plaintiff, a fugitive from justice, to the defendant, to secure his release from arrest, in affirming the judgment for defendant, he says:

We know that an innocent man may, from want of firmness, or want of trust in the fairness of our tribunals, or the integrity of witnesses, or from horror at being suspected of crime, be induced to pay money, even perhaps to compound and stifle a

<sup>9</sup> 9 Vermont Reports, 138, 141.

<sup>10</sup> 9 Vermont Reports, 310, 318, 319.

prosecution. But however innocent one may be of the offense charged, such an escape could not fail to involve the party in almost equal guilt with the actual offender. And we do not perceive any such constraint in the present case, as would be likely to enable persons to extort money at will from the innocent although not unsuspected. What has been said has not been done with any intention to cast suspicion upon the character or conduct of any one, but from necessity to show the degree of guilt attaching to the plaintiff's conduct. And, at the same time, it is apparent the defendant does not escape through his own innocence, but because the plaintiff's hands are too corrupt to handle the price of guilt, which he must therefore lose, and which the defendant retains from necessity and against the laws both of honor and good conscience.

No practical considerations were too minute or trivial to escape his observation, and receive due weight in the determination of a cause. Their treatment, in the analysis of a legal question, is shown by his remarks in the opinion in *Merritt vs. Claghorn*,<sup>11</sup> a clear and sound review of the cases, and deduction of the law governing an innkeeper's liability for loss of his guest's property by inevitable casualty. He says:

We are aware that it would doubtless have been possible by human means to have so vigilantly guarded these buildings, as possibly to have prevented the fire. But such extreme caution, in remote country towns, is not expected, and if practiced, as a general thing, must very considerably increase charges upon guests, which they would not wish to incur ordinarily for the remote and possible advantage which might accrue to them.

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<sup>11</sup> 23 Vermont Reports, 177, 181.

Judge Redfield studied the law as a science. He sought the fountains, and familiarized himself with legal institutions, and the reasons for their existence; his knowledge was thorough and complete, so that when the case demanded it, he could and did fortify his judgment by reasoning so clear as to work an intelligent conviction in the simplest mind. Thus in *Gorham vs. Daniels*,<sup>12</sup> in declaring that the statute of uses, 27 Henry, VIII, is not in force in Vermont, he says:

So far as the conveyance of lands, in this state is concerned, it seems to me, that our statutes are fully adequate to all the ordinary incidents of the subject, and that in those extraordinary occasions, where the statute of uses might answer a good end, it will be safer, and better every way, to have resort to a court of equity, than to introduce a portion of the ancient common law system of conveying real estate, most of the incidents of which having been materially modified, even in England, since the separation of this country from that, it would become necessary immediately to resort to very extensive legislation, in order to render this addition to our present laws even tolerable. This view is certainly confirmed by the history of our jurisprudence upon this subject. . . . We entertain no doubt, that our system of conveyancing, so different from the English, so simple and intelligible to all, and so intended to be, by means of a thorough system of registry, from the very first, was designed to be entire in itself. And although most of its terms and many of its forms of deeds even, like that of bargain and sale, derived their meaning and operation, to some extent, from the common law and the English statutes, and that of uses among others, yet it was no doubt the purpose of the framers of our laws upon conveyancing to have

<sup>12</sup> 23 Vermont Reports, 600, 609.

them "*understanded*" of the people, without the necessity of resorting to the study of the subject in other quarters.<sup>13</sup>

Dustin vs. Cowdry,<sup>14</sup> was an action of trespass, in which the grievance complained of was an entry by force and a strong hand, against the strenuous resistance of the plaintiff and his friends. The family were driven from the house in the winter, and the family and household effects were turned into the public highway. In this cause Judge Redfield sat in review of his judgment in the court below, where the jury had returned a verdict for the defendants under his instructions that if the plaintiff's term had expired and he, upon reasonable request, refused to leave the premises, the defendants, as agents of the landlord, had the right to put out the plaintiff and his family using all the force necessary to obtain

<sup>13</sup> In a note to this case, Judge Redfield says:—"I have spoken of dower in one-third of the husband's real estate of inheritance, as a common law right which strictly it is not. That is now fixed by a succession of English statutes, and in that country extends to all the dowable estate of which the husband was seized during the coverture. At common law, the husband might endow his wife of such portion of his estate, as the terms of the marriage contract required, and this was done before the priest, as a part of the marriage service, as the ritual of the English church still indicates,—“of all my worldly goods I thee endow,—” which is now regarded as of no other significance than to give the wife in form, what she is in law entitled to claim,—a maintenance out of his property during life, but formerly it was essential to the wife's right. The incidents attending the estate of dower in the English law before Magna Charta, are rather matters of curious speculation to the learned antiquary than of any practical value toward a correct understanding of the subject, here or in England, where it has for many centuries been dependent exclusively upon statutes, and which has always been the case in the American States.”

<sup>14</sup> 23 Vermont Reports, 631.

possession. In his opinion reversing the judgment, and holding his instructions erroneous, he says:

We entertain no doubt, that such a principle of law, as that for which the defendants contend, and which is embraced in the charge of the court in this case, did exist in England from the time of the Norman Conqueror, until the statute of 5 Richard II, Chapter 8, of Forcible Entry and Detainer,—a period of nearly three hundred years. And it might have existed prior to the Norman Conquest, but I find no authentic account of its existence prior to that date, and it seems to us far more in accordance with the social polity of the Conqueror and his immediate descendants, than with any other, which ever obtained in that country. It is a principle more in conformity with a tenure of land of some superior, or over lord, whose mere will is the law of the tenure, converting the tenant into a mere menial, or dependent, than with the tenure of free and common socage, where the tenant is absolutely, as really and to all intents, as much a freeman, as the landlord, and where the rights of the humblest are as much respected, and as readily and as minutely vindicated by the authority of the state, both judicial and executive, as are those of the most powerful. And it is certain, we think, that such a mode of reducing rights of action to possession is more suited to the turbulence and violence of those early times, when no man, whose head was of much importance to the state, felt secure of retaining it upon his shoulders for an hour, than to the quiet and order and general harmony of the nineteenth century. But that such was the ancient common law of England we have the authority of Hawkins, vol. I, Chapter 64, Section 1, and of many others.

But as men advanced towards equality, and claimed to have their rights respected and guaranteed to them, and more carefully defined, this state of the law became intolerable, and was among the first to be abrogated by Parliament. The resistance of the English barons at Runnymede extorted from King John, the Magna Charta of English and American liberty, and that of Wat

Tyler and his associates, to Richard II, accomplished scarcely less for the peace, quiet, and good order of the realm, when it compelled the king and the extensive landholders to consent, in Parliament, to the statute against all forcible entry into lands, even by those having good title, and, as a correlative, compelled those whose titles had expired, to make summary surrender.

But we not seldom hear it asserted upon this side of the Atlantic, by those comparatively novices in the profession, that it is absurd, that one shall be held liable to an action of trespass, for entering forcibly into possession of his own property, just as if it were a clear point, that one might take possession of his own property, in his own way, even at the expense of violating all laws, human and divine. And such a doctrine may have received some countenance from the decisions of this court. But it is, in my deliberate but humble judgment, a most dangerous doctrine, come from what elevated source it may. And the sooner it is discountenanced by the courts, the better for the peace and quiet of the state.

Speaking of the defendants' position, he says:

It is not improbable, they may have been led into this misapprehension of the law by some of the recent determinations of this court. And I would not affect to disguise my own sense of satisfaction, that a principle, which I esteem of such vital importance should be established; and it ought not to lessen the public confidence in the wisdom of any tribunal, because having pursued one principle of law, until it begins unjustly to infringe upon the integrity of the system, they seek the first opportunity, fairly presented, with just circumspection to retrace their footsteps, and to declare their convictions of the necessity of such a retrocession, in the plainest, most unmistakable terms, so that, in future, the rule of law may be understood by all. This thing is done much more frequently in Westminster Hall, than in our American courts, perhaps; but every where it is done, and the sooner the better, if it were to be done.

In civil causes the judge was sure to seek and apt to find redress for actual wrongdoing, be the perpetrator old or young, and to demonstrate the justice and propriety of the law laid down as a rule of civil conduct in such cases. Thus, *Towne vs. Wiley*,<sup>15</sup> is a leading case upon the subject of the liability of an infant for property bailed. The defendant, an infant, hired a horse to go to B., and return the same day; he went to B., but returned by a circuitous route, not arriving until 8 o'clock the next morning, and having overdriven and otherwise abused the horse, so that in consequence thereof, he died. He was held liable in trover. In the opinion Judge Redfield says:

The cases upon the subject of the liability of infants for torts, when viewed with reference to their facts, may not seem altogether consistent; but when the principle upon which the courts profess to proceed, is examined, they will all be found to be placed upon the same ground; and no case is to be regarded as authority, except for the principle upon which the courts professed to proceed in deciding it.

In applying the rule that a departure from the terms of the bailment amounts to a conversion of the property, he remarks:

And this is no hardship; for the infant as well knows that it is perpetrating a positive and substantial wrong, when he hires a horse for one purpose and puts him to another, as he does when he takes another's property by way of trespass. The case of *Homer vs. Thwing*, 3 Pick. 492, is in all its leading facts, and

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<sup>15</sup> 23 Vermont Reports, 355, 359.



every way in principle, identical with the present. The case of *Fitts vs. Hall*, 9 N. H. 441, goes even farther, perhaps, and yet we like the good sense and love of fair dealing evinced by the decision of that case. There an infant, by representing himself of full age, gains credit, giving his note, and when sued upon the note, avoids it on the ground of infancy. The court held him liable for the goods, in trespass on the case. It may not be important to inquire how far this decision will stand with *Johnson vs. Pie*, 1 Lev. 169; S. C. 1 Keb. 905; *ib.* 913; 1 Sid. 129; 10 Peters' Ab. 559, or with some other of the old cases. But for one, I must say, I like the truthfulness and firmness evinced in the decision. It seems to me to be a case far more worthy of respect than that class of cases, where the courts have shown so much solicitude to give the infant the benefit of my Lord Mansfield's shield, that they have allowed him sometimes to use his privilege as a weapon of offense also.

So too, in reference to an infant's contract for necessities, the opinion in *Bradley vs. Pratt*,<sup>16</sup> shows the judge's determination that morality, equity and justice shall prevail, rather than be sacrificed to the law's technicality. The defendant, an infant, was indebted to B. for twenty weeks' board at \$2.50 per week and at B.'s request executed and delivered his negotiable note for fifty dollars to plaintiff, the board being the sole consideration. Plaintiff brought suit upon the note. It was held that the question of consideration was open to inquiry and that upon the facts, the defendant was liable for the full amount of note and interest. Judge Redfield says:

We think that the infant should be enabled to pledge his credit for necessities to any extent, consistent with his perfect safety.

<sup>16</sup> 23 Vermont Reports, 378.

. . . I do not well comprehend why upon principle any express contract may not be said to be binding upon him, when it is shown to have been given for necessities and the price to have been reasonable, if it be one, where the consideration may be inquired into,—a promissory note or an account stated. . . . As confessedly the infant may *prima facie* avoid his note, or bill, by merely showing the fact of his infancy at the time of making the contract, what is the impropriety in allowing the plaintiff to recover in all such cases, by showing the consideration to be for necessities. . . . As the contract remains in a form to be open to all defenses, we see no reason whatever, why the party should be driven out of court upon mere form.

As affecting the rights of children to recover damages for personal injuries resulting from negligence, Judge Redfield, in the case of *Robinson vs. Cone*,<sup>17</sup> established the rule that the contributory negligence of a parent, guardian, or other person having control of a child is not to be imputed to the child, and is no defense to the child's action, a rule since adopted in at least twenty states of the Union, including Connecticut, Illinois, Iowa, Michigan, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania and Virginia.

As a minister of justice in the administration of the Criminal law of Vermont, Judge Redfield was firm, inflexible, and no respecter of persons, and intended and strove to make the law a terror to evil doers. His views upon this subject are clearly and unequivocally stated in his decision upon the *habeas corpus* petition of Gardner Tracy, imprisoned in the

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<sup>17</sup> 22 Vermont Reports, 213.

common jail in Grand Isle County, upon a *mittimus* issued by a Justice of the Peace, for violation of the license law of 1850, which expressly provided that prosecutions for its violation might be brought before justices of the peace. He says:<sup>18</sup>

It is no concern of ours, whether such a provision is by us regarded as so desirable in this class of offenses, as to justify a special statute to that effect or not. The legislature chose for reasons satisfactory to themselves to give concurrent jurisdiction to justices and the County Court for all prosecutions for violations of this statute; and it is a matter of infinitely little importance to us, or to others, what the people at large, or any given portion of the body politic, may think of the wisdom or justice of such a provision, so long as it is clearly made, and no question can be made of the perfect right of the legislature to do so.

If it were important, it would not be difficult doubtless to show that there is great irregularity and imperfection in the practical operation and administration of the criminal law of the state. To one who has seen much of it and found it sometimes utterly futile to attempt to bring about anything like equal and unflinching justice to all, it is by no means surprising that men, who have attended to the working of the system, only in some particular department, should painfully feel its impotence there, and strive to remedy it by further legislation. . . . It has appeared to me that generally the present defects exist more in the administration than in the provisions of the law. . . . To illustrate my meaning and prevent misapprehension, I will allude to the most common expedient, and probably the most reprehensible practice here, in the efforts to screen what are esteemed hopeful offenders (and that is made, sometimes, I fear, to include all who have property, influence or friends) from coming to trial. This is more commonly done by giving nominal bail before some magis-

<sup>18</sup> 25 Vermont Reports, 93, 97, 98.

trate, who either does not comprehend very fully the importance of his duty, or who has not perhaps quite nerve enough (and it requires a good deal when beset by an array of friends and neighbors) to do his duty. This done, the bonds are expected to be chanced to a still more insignificant sum, if possible in the higher courts, and thus all are made, in some sense, if conscious of the full purport of their conduct, to become accessory to the virtual compounding of felony. There is no doubt quite too much of this practiced in our courts, to allow me to criticize with much severity any statute intended to render the administration of criminal law more uniform. And I need not say that I have not generally deemed it my duty to study devices, whereby offenders could escape merited punishment. And I have not often had to reflect upon the possibility that any innocent man ever fell under the censure of the law through any instrumentality of mine, and I should certainly regret that the law should compel me to connive at the escape of the confessedly guilty. I believe, and of course I must be permitted to act upon the belief, that the law *must* be made a "terror to the evil doer," in order that it may *become* a praise "to him that doeth well."

And again, *in re Powers*,<sup>19</sup> he says:

It is scarcely necessary, we trust, at this late day, to say, that the judicial tribunals of the state have no concern with the policy of legislation. That is a matter resting altogether within the discretion of another co-ordinate branch of the government. The judicial power cannot legitimately question the policy, or refuse to sanction the provisions of any law, not inconsistent with the fundamental law of the state.

This matter arose in 1853 under the prohibitory law; and the court's views upon that then all engrossing subject are tersely expressed:

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<sup>19</sup> 25 Vermont Reports, 261, 265.

The whole matter is very considerably affected in our view, if we settle clearly in our minds, that the legislature are the sole judges, how far drunkenness or those who aid in its perpetration are punishable criminally. I take it that at this day, it is scarcely needful for the court to spend words in vindicating this acknowledged right of the legislature. How far the thing is curable by any process of mere legislative restriction is a matter with which we have here no possible concern.

His determination was to assert and enforce the law, as it was. Thus, in *State vs. Freeman*,<sup>20</sup> a prosecution under the prohibitory law of 1852, he says:

In regard to the propriety or practical utility of such stringent provisions as to a single class of offenses, there is no doubt ground for difference of opinion. Of the right of the legislature to make such discrimination, or that they did intend to make it, in regard to the offenses against the liquor law of 1852, in all the Courts in the state, I think no one could read the law and doubt. And it seems to me to be the duty of the courts, in construing the law to give it a fair and reasonable interpretation, with a view to carry out fairly the purpose and intention of the statute, . . . neither to patch up its defects, on the one hand, or garble and pervert it on the other. Let it have a fair trial, as it is, and as it was intended to be, and that will test its utility.

And Judge Redfield did what he could by wise, plain and practical instructions to the officers of the law to insure the faithful and efficient performance by the grand and petit juries of their important duties. Thus in his charge to the Grand Jury of Washington County, in 1848, in impressing upon

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<sup>20</sup> 27 Vermont Reports, 520, 528.

them the importance of secrecy in their proceedings, he says:

Men are not inclined to keep secrets, unless they are of great importance, and then they are sometimes not a little burdensome. But it is more important, that, if the proceedings are attempted to be kept secret, they should be. For if their proceedings are nominally secret, but really to be made public, there is much more difficulty and danger in the members' acting freely, than if their proceedings were held before the public eye. A man will be very often blamed for saying that in secret, which, if he had said it openly the same persons who blame him, would have pronounced not only proper but praiseworthy. Hence those persons, who always think aloud or speak without disguise their whole thoughts, may say almost anything, and not be blamed, by those even who come under their censure, while a reserved and cautious man, who confidentially makes an unkind remark, which happens to come before the public, finds no forgiveness. So that while your proceedings are supposed to be secret, if they are not in fact so, it is even worse than if they were known to the public. This secrecy may not be important in one case in a hundred, but the rule was intended for the hundredth case, and unless it is observed in the ninety and nine, it will not be likely to be in the one hundredth. . . . In enumerating the particulars in which a grand jury is liable to fail of accomplishing the greatest possible good, I ought, perhaps, to caution you against leaning too much upon the opinion of each other. In a considerably numerous body, there is perhaps some danger that this feeling may sometimes induce them to consent to a course of action, with which no one of the individuals is exactly satisfied, or for which he would be willing to be held personally responsible, or to which, indeed, he would have felt prepared to consent, if he had expected to bear the whole burden of responsibility. . . . No man need be fearful of giving offense by doing his duty in a proper manner, and with a proper spirit. And in commending in jurors a proper degree of feeling of per-

sonal responsibility, I shall not be understood, I trust, as giving countenance to that unrelenting pertinacity of opinion, which would insist *in limine* that his mind was made up, beyond possibility of change. Very far from it. The firmest, most sensible, well-informed, and conscientious men are not always the most difficult to be convinced of an error, but they must be convinced, before they can be induced to change their course. Such men are always ready to listen to arguments addressed to their reason, to their experience, and to their sense of justice, but slow to comprehend the force of those which address themselves mainly to their pride, or self-love, or to considerations of expediency and policy merely.

Judge Redfield by precept and practice enforced Lord Mansfield's doctrine, that, "General rules are wisely established for attaining justice with ease, certainty and despatch. But the great end of them being 'to do justice' the Courts are to see that it be really attained." "The genuine test is '*boni judicis ampliari justitiam*,' not *jurisdictionem* as it has been often cited." <sup>21</sup>

He gradually but persistently enforced the rules of the common law upon principles of equity. In the province of equity law his extensive learning and vigorous and exhaustive reasoning are most conspicuous and his duties as chancellor furnished an ample field for the exercise of his eminent abilities. The case of *Henry vs. Tupper*,<sup>22</sup> is a fair example of his method. The question was whether equitable

<sup>21</sup> *Rex vs. Mayor of Carmarthen*, 1 Burrow's Reports, 292, 301. Cited by Lord Campbell, *Lives of Chief-Justices*, vol. II, 336, edition of 1851.

<sup>22</sup> 29 Vermont Reports, 358, 371.

relief will be afforded a grantor of land, who has failed to fulfil the covenant annexed to the deed for the support, etc., of the grantee, and if so, under what circumstances. The defendant claimed the land was absolutely forfeited; no full compensation could be made, and equity should not interfere. In his opinion Judge Redfield says:

The deed seems to us to be in form substantially a mortgage. It is a deed subject to defeasance by the non-fulfilment of a condition subsequent. And that is all there is in any mortgage. At law the estate is gone forever, strictly speaking.

But equity, as a general thing, will relieve the party from such a forfeiture. It will do it in all cases, it is said, where compensation can be made. . . . If the matter is really capable of compensation, it is more doubtful, perhaps, whether the cases will warrant any denial of relief, upon the ground that the forfeiture was not the result of accident.

These two points (wilful neglect and non-performance), seem to me to have been very generally mixed up, most inextricably in the equity decisions upon the subject. . . . It certainly cannot be maintained, from the authorities, that relief is in all cases limited to the non-payment of money. Nor is there any principle whereby it can be made to appear that such cases are the only ones, where compensation can be made. Many collateral duties are just as susceptible of compensation as a covenant to pay money, as undertakings to deliver goods, to repair premises, or to afford support even; for in all these cases the non-performance, at the time, is not fully compensated by the payment of the same value and interest at an after time. The non-payment of a sum of money, at a particular time, may under circumstances, be one's ruin, at others it may be a positive benefit, if the interest be subsequently paid; and so of any collateral duty.

But the apprehension, that this equitable relief shall be abso-



lutely confined to cases of pecuniary debts, is certainly presenting a very shortened view of the range of equitable principles. Such a limit, to be held absolutely binding in all cases would certainly look like an evasion of just and reasonable discretion.

This very class of cases will afford abundant illustrations of the essential necessity and manifest propriety of holding the subject under the control of the Courts of Chancery, and making the relief dependent, to some extent, upon circumstances. The case might occur where the refusal to afford daily support would be wanton and wicked; indeed where it might proceed from murderous intentions even, and it is even supposable that the treatment of those who were the objects of the services, should be such as to subject the grantor to indictment for manslaughter, or murder even, and possibly to ignominious punishment, and to death. To afford relief in such a case for the benefit of the heirs, would be to make the court almost partakers in the offense.

And the case upon the other hand is entirely supposable and of not infrequent occurrence, where, through mere inadvertence, a technical breach may have occurred in the non-performance of some unimportant particular, in kind or degree, where, through perhaps mere indifference in construction, or error in judgment, one may have suffered a forfeiture of an estate at law of thousands of dollars in value, where the collateral service was not of one dollar's value, and attended with no serious inconvenience to the grantee. Not to afford relief in such case would be a discredit to the enlightened jurisprudence of the English nation and those American States who have attempted to follow the same model.<sup>23</sup>

The system of Railroad law of the United States had its origin while Judge Redfield was upon the

<sup>23</sup> Meach vs. Meach, 24 Vermont Reports, 591, and the note, p. 600, upon the question *donatio mortis causa*, Smith's Admr. vs. Wainwright's Admr., 24 Vermont Reports, 97, upon the question of equity jurisdiction in the matter of the offsets and for protection of sure-

bench, and he watched its growth from the beginning. Many important questions first arose in Vermont, and were solved in such a way as to command universal approval. Judge Redfield studied the subject thoroughly, fully aware of its vast and ever increasing importance, growing with it, and keeping pace with its constant expansion. A single illustration must suffice. What is noticeable is the clear-sighted wisdom of the magistrate. He says: <sup>24</sup>

Legislation in the infancy of all new undertakings, is more imperfect than it will be likely to be, when such projects are more fully matured. . . . Hence it is not always easy to impose upon these companies the obligation to do in all cases, what simple justice requires, and those who suffer essential, and sometimes perhaps, ruinous injuries, or rather damage, by their construction and operation, must be content to take the law as it is. They must remember that courts do not ordinarily make the law upon this subject, more than others, but only take it as they find it, ready made to their hands, and apply it in such manner and to such cases, as it was intended to reach.

It is no fair test of the general liability of a railroad company for their acts, to argue from what natural persons may lawfully do, and what, if done by them, becomes a nuisance. . . . In the absence of all statutory provisions to that effect, no case, and certainly, no principle seems to justify the subjecting a person, natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damage to other persons, in their property, or business. This always happens, more or less,

ties, are instances of his considerations of equity law, which deserve examination. See also *Howard & Wife vs. Brown*, 11 Vermont Reports, 361, an action at law. The law has since been changed in Vermont by statute.

<sup>24</sup> *Hatch vs. Vermont Central Railroad*, 25 Vermont Reports, 49, 58.

in all rival pursuits and often where there is nothing of that kind. One mill, or store, or school, often injures another. One's dwelling is undermined, or its lights darkened, or its prospect obscured and thus materially lessened in value, by the erection of other buildings upon the lands of other proprietors. One is beset with noise, or dust or other inconvenience by the alteration of a street, or more especially by the introduction of a railway, but there is no redress in any of these cases.

The thing is lawful in the railroad, as much as in the other cases supposed. One would not care if they were altogether excluded from cities and large villages. But the legislature have determined otherwise and the plaintiff must be content to take his chance with other citizens. These public works come too near some and too remote from others. They benefit many and injure some. It is not possible to equalize the advantages and disadvantages. It is so with everything and always will be. We do not expect to have the consolation, if consolation it be, to know that these little inequalities will ever be made precisely equal with us all, in this life. But it will be so at no very distant day, and it becomes a reasonable man perhaps not to magnify them inordinately since they are so short lived and so absolutely past the remedy of all human skill. Those most skilled in these matters, even empyrics of the most sanguine pretensions, soon find their philosophy at fault, in all attempts at equalizing the ills of life. The advantages and disadvantages of a single railway could not be satisfactorily balanced by all the courts of the state in forty years. Hence they must be left, as all other consequential damage and gain is left, to balance and counterbalance itself, as it best can.

As said by Mr. Phelps, Judge Redfield's judicial opinions "form the enduring monument by which he will be judged among lawyers, when all the generations of those who knew him shall have followed him to the grave. They show in some measure the

field of his exertions and the usefulness of his long service in the administration of justice." They seem the most fitting exponent of his life and legal influence. The foregoing extracts exemplify his wisdom in the application of principles, his comprehensiveness and exactness of illustration, his serenity of thought, and loftiness of sentiment, and his love of justice and devotion to law.

With such attributes, it was no wonder that although a majority were his political opponents, the legislature of his state continued to elect him annually to the exalted place which he filled so well.

During his term of service his duties were arduous. There were five judges of the Supreme Court at first, afterwards three, and then the number was increased in 1857 to six. During most of the time they held circuit or county courts for jury trials, exercised the duties of chancellor, and sat in banc at regular stated terms of the Supreme Court, several times every year. They were required to travel the state throughout every county. Although their elections were annual there was remarkable permanency in office, and Judge Redfield was satisfied that the system of annual elections was well adapted to the people and government of Vermont.

The decisions of the court of which he was a member bear the impress and carry the weight of his great learning and authority. He combined in marked degree, the knowledge of the law, and reverence for precedents, which characterized Lord

Kenyon, with the vigorous deductive reasoning, learned accomplishments, and elegant ingenuity, which distinguished and made illustrious Lord Mansfield. His influence was in his example as a Judge, and consisted chiefly in his uniform, even, and certain administration of the law to the cause presented, without delay, without hesitation, without doubt. He brought to the consideration of every case, however trivial, impartial gravity, and arrived at its determination with exact precision. The full citations from a few decisions are here made, as presenting his portrait, and because the firm establishment in Vermont, of those principles, which are the foundation of English jurisprudence, are believed to be the direct result of such and similar decisions of his court, so impressively affected by the influence of his character, and its reliance upon his worth.

There was no secret about Judge Redfield's hold upon the community in which he lived and served. They chose him because they knew he was learned, wise and honest, and impartial and just, and good and great. He possessed their abiding confidence. And when they saw him dignifying the position of Chief Judge of the Supreme Court they believed and realized that his nobility of character made his exalted office more venerable and illustrious.

Although his labors upon the bench were assiduous, Judge Redfield found time to write legal articles and a text book on Railways, the first edition of which was published in 1857. He also enriched the

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volumes of Reports of his state with copious and instructive notes of various decisions. In 1860, he resolved to withdraw from the bench and from public life. His political opinions were not in accord with the sentiment of his state. He desired to devote himself to the preparation of a new edition of his work on railways and a work on wills, then in preparation; and he had received liberal offers to edit an edition of Story's works. Doubtless all these considerations influenced his determination to retire, and apply himself to the literature of the law. His last term of court was at Montpelier, in November, 1860. The bar adopted and presented a series of genuine and heartfelt resolutions, to which Judge Redfield replied with simplicity and affection.

His own words<sup>25</sup> are a faithful expression of his loyalty and sense of duty and an exact statement of his character as a public servant.

My public services have been performed under circumstances of very marked peculiarity, to which you have very appropriately alluded. But while my position has been, in some respects more trying in consequence of its delicacy, it has been in other respects favorable to the cultivation of those feelings and opinions, which are indispensable to judicial impartiality, and independence.

It has compelled me to devote myself with the more perfect single-heartedness to the discharge of my public duties; and it has at the same time weaned me from all embarrassing interest in the course, or the result of mere partizan policies, without in the least diminishing my study of, and interest in, those great social and moral, not to say religious problems, which lie at the foundation

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<sup>25</sup> 36 Vermont Reports, 765.

of all true greatness and respect, as well in empires and states as with individuals. And among these I have never allowed myself to feel for a moment that I was at liberty to forget that an abiding and unaffected respect for the law and its regularly constituted ministers, whatever might be my private opinions of the wisdom of the one, or the good character of the other, must certainly be reckoned.

And in view of this I have always and under all circumstances, felt it my duty to study to vindicate all laws, however odious, from that contumely and reproach, which the well disposed and truly patriotic will sometimes thoughtlessly heap upon the constitution or laws of the state or the nation, without reflecting that in so doing, they are doing all in their power to destroy that respect for law and order in society, which is the only guaranty in free states against outrage and abuse from the reckless violence of the mob or the assassin on the one hand, or of overbearing and unscrupulous majorities on the other.

I have thus made it my study to do nothing and to say nothing calculated to offend the sensibilities of others, unless from a strict sense of duty, and in vindication of those great moral truths which underlie the very foundations of all domestic, social and civil institutions, and then not obtrusively or offensively, I trust, but none the less fearlessly.

So terminated his career as Judge of the Supreme Court of Vermont. He had faithfully kept his trust; uprightly, deliberately, resolutely, confiding in a higher strength than his own. Dispassionately, attentively, without prepossession or prejudice, reserving his judgment until the cause was submitted; with justice, without bigotry, without fear, or favor, or concern for popular clamor, or applause, or the speech of people; merciful, moderate, incorruptible.

In full vigor of mind and body he left the field of his long public service for his new labors. In Boston, besides his literary work, he was extensively employed as counsel in important causes, and wrote several opinions, many of which were published and he occasionally argued causes in the courts. The strength of his reasoning and the breadth of his views and their freedom from technicalities had won for him a national reputation. His studies were exhaustive, embracing not only the current decisions of English and American Courts, but the history and literature of the law, civil, common, and international. He breathed its spirit, and instinctively determined to give of his abundance, to his professional brethren, instruction in his beloved science. Among other contributions he wrote to Senator Foot a letter, published in November, 1865, upon the points settled by the war, the status of the southern states, and the duties of the national government in the matter of reconstruction. This letter is remarkable chiefly as showing Judge Redfield's loyal acquiescence in the great result, accomplished by the war, which he describes as the final and conclusive settlement that the "national sovereignty is not only supreme but also the judge of the extent and nature of its own powers."

His work upon the American Law Register was important and extensive, "covering," it is said, "every branch of the law, and every variety of treatment, from a brief pertinent criticism of the case it-



self, up to the most learned monograph on the subject suggested by it.”<sup>26</sup>

Although before the war Judge Redfield had been a Democrat of the straitest sect, his legal conviction of the results of the contest, as above mentioned, in its establishment forever of national supremacy necessarily made him an advocate of the unlimited power of Congress in regard to interstate commerce, and in January, 1874, he published in the *Law Register*, a characteristic and forcible article upon the regulation of interstate traffic upon railways by Congress, in which he fearlessly and directly expresses views as to the right and necessity of governmental action as extreme as any that we hear to-day. In one of his articles in the *American Law Register* he says:<sup>27</sup>

Unless we are prepared to say, that one of the most unlimited and overwhelming monopolies it is possible to conceive of, after it is once set in operation, may safely be committed to the impulses of its own selfish instincts and interests, without any supervision

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<sup>26</sup> See the remarks of Honorable James T. Mitchell, now the Chief Justice of Pennsylvania, in *American Law Register*, vol. XL (new series), 259.

Those articles in the *American Law Register* which Judge Redfield is said to have regarded as his best were the following:—*Street Railways*, vol. I (new series), 193; *Mortgages*, vol. II (new series) 1; *Conflict of Laws, Affecting Marriage and Divorce*, vol. III (new series), 19; *Responsibilities and Duties of Express Carriers*, vol. V (new series), 1; *Regulation of Inter-State Traffic by Congress*, vol. XIII (new series), 1; *Law Applicable to the Revocation of Contracts by Telegraph*, vol. XIV (new series), 401; *Right and Power of Eminent Domain in the National Government*, vol. XV (new series), 193.

<sup>27</sup> *American Law Register*, vol. XIII (new series), 5.

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or control whatever, we may demand the interposition of Congress in this matter.

He had, in *Thorpe vs. Railroad Company*,<sup>28</sup> expressed his opinion of the unlimited power of the Vermont Legislature in respect of railroads, unless restricted by the constitution, or expressly or by necessary implication in the company's charter.

His style in writing was redundant, but never obscure; it was luminous; gems of thought lavishly set in jewels of reflection.<sup>29</sup>

In the present age of invention, improvement and accomplishment the tendency is to inquire, in the review of a life, *what* was done, rather than *how*? Judge Redfield's life-work answers the test of end and means. No memorial of him would be truthful that did not bear witness to his devout Christianity and humble piety. He lived as in the presence of his Maker, secure of the treasures of

"Love and Light,  
And calm thoughts, regular as infant's breath."

And so having finished his labors, he died, not as one who had worked out his salvation in fear and trembling, but rather as a loyal servant and unselfish follower, who without thought of merit or reward had done his duty in that station of life unto which it had pleased God to call him.

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<sup>28</sup> 27 Vermont Reports, 140.

<sup>29</sup> See *Allen vs. Lyman*, 27 Vermont Reports, 20, 24, 25, 26; *Stevens vs. Kent*, 26 Vermont Reports, 503, 510.



JOHN APPLETON.



JOHN APPLETON

A photograph on porcelain by F. C. Weaton, in possession of Hon.  
F. H. Appleton, of Bangor, Maine.









# JOHN APPLETON.

1804-1891.

BY

CHARLES HAMLIN,

*of the Maine Bar.*

NO Maine lawyer lived up with fuller measure to this maxim of Bacon than John Appleton: "I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves by way of amends to be a help and ornament thereto." A survey of his life will show that he "hitched his wagon to a star" and held with singular enthusiasm to Bolingbroke's tribute to the Law: "There have been lawyers that were orators, philosophers, historians; there have been Bacons and Clarendons, my lord; there shall be none such any more, till in some better age men learn to prefer fame to pelf, and climb to the vantage ground of general science."

The purpose of this essay, besides a sketch of his life, is to demonstrate the truth of this introduction.

The professional life of John Appleton who was

the sixth Chief-Justice of Maine covers a period of fifty-seven years.

John Appleton was well born. He came of an ancestry whose lineage carries us back to Norman ancestors, of knightly rank in feudal ages, then appearing later on in the person of Samuel Appleton as a Puritan immigrant, a "godly, noble, enterprising exponent of civil and religious liberty," taking the Freeman's oath May 25th, 1636, in the colony of Massachusetts. He died in 1670 at Rowley, leaving a son bearing his name, who served with the rank of major in King Philip's war, and was conspicuous also in political affairs. Under the leadership of Samuel and John Appleton the town of Ipswich voted, in reference to the order of Governor Sir Edmund Andros: "That considering said act has infringed upon our liberty, as it is contrary to the acts of His Majesty, by violating the statute law of the land, which declares that no taxation shall be laid unless with the consent of the people; they do therefore vote first, that they will not choose a commissioner, and decide that the Selectmen shall not lay such a tax till it is determined on by the people." This has been well called the Declaration of Independence in embryo, although it happened in the preceding century. Sir Edmund Andros was deposed during the English Revolution of 1688, and Major Appleton had the stern satisfaction of handing Andros into the boat which conveyed the crest-fallen tyrant to the castle. Major Samuel Appleton

died in great honor in the year 1696. His third son was Major Isaac Appleton who died in 1747. Isaac was born in 1664, at Ipswich, and married Priscilla Baker, a granddaughter of Lieutenant-Governor Symonds, whose wife was a daughter of Governor Winthrop. Isaac Appleton, second, was born in 1704, at Ipswich, and married Elizabeth Sawyer of Wells, Maine. He was the father of ten children. Of these, Francis, who settled at New Ipswich, N. H., was the second. He was born in 1732, and married a lady named Hubbard, by whom he became the father of four children, of whom John was the third. John Appleton married Elizabeth Peabody, by whom he was the father of an only son, the future Chief-Justice of Maine.

Judge Appleton's mother died when he was only four years old, and he was left with an only sister thus early in life to the care of others.

He was born at New Ipswich, New Hampshire, July 12th, 1804, and died in Bangor, Maine, February 7th, 1891, in his eighty-seventh year. He was educated at Bowdoin College under the tuition of his uncle, the Reverend Jesse Appleton, then its President and a distinguished ripe scholar and gentleman. He entered the college at the early age of fourteen. This was in 1818 and his journey of several days to Brunswick from New Ipswich in an old-fashioned two-wheeled chaise with his uncle was an event to be remembered, for he often referred to it in his allusions to his boyhood days. In his college days

he was a diligent student and became proficient in his knowledge of the classics, especially the Latin from which his frequent and felicitous quotations, both oral and written are noticeable. After his graduation he was for a few months an assistant teacher in Dummer Academy, Byfield, Massachusetts. He also taught in Watertown. He studied law with George F. Farley, Esq., of Groton and with Honorable Nathan D. Appleton of Alfred. In 1826 and shortly after he arrived at majority, he was admitted to the bar at Amherst, New Hampshire.

He began the practice of law, the same year, at Dixmont, Penobscot County, Maine, and after a few months removed to Sebec in the adjoining county of Piscataquis.

His office in Sebec was in the second story of a store building and was reached by stairs on the outside. And it was in this obscure office, in this border town, that the future distinguished Chief-Justice laid the foundation of his future fame and fortune. Here the young lawyer embarked in his chosen profession, thrown upon his own resources and thoroughly conscious that he must rely on himself. Nor did he find the time weighing heavily on him for want of occupation. His practice was lucrative for a border town, and he soon obtained his share of the business then in the hands of three other lawyers of the county. He had early acquired the habit of close study and was a most diligent reader of all that relates to the law. Thus busily engaged

in bringing suits and the trial of cases, he found time, during his six years' residence in Sebec, to investigate what seemed to him outworn creeds and useless machinery in the law of evidence as it then existed. Like Bentham he became convinced that its excrescences and useless absurdities ought to be discarded. Accordingly he contributed to the legal and literary journals of those days articles on the Law of Evidence and was the first American writer to strongly advocate a change of the law whereby parties in all cases, both civil and criminal, should be allowed to testify as witnesses, leaving the jury to decide as to their credibility.

These articles have been published by him, after the change was partly made, so far as concerned civil cases, in a volume entitled: *The Rules of Evidence Stated and Discussed*.<sup>1</sup>

The following extract from the preface of the

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<sup>1</sup> The book contains sixteen chapters and is divided as follows: Chapter I. The arguments in Favor of Excluding Witnesses Considered. Chapter II. Of the Incompetency from Defect of Religious Principle. Chapter III. Of the Incompetency of Witnesses from Infamy of Character. Chapter IV. Of the Incompetency of Witnesses from Interest. Chapter V. Of the Incompetency of Parties as Witnesses at Common Law. Chapter VI. Of the Admissibility of Parties as Witnesses in Equity. Chapter VII. Of the Admissibility of Parties as Witnesses in Criminal Procedure. Chapter VIII. Of the Admissibility of Accomplices and Parties to the Record in Criminal Procedure. Chapter IX. Of the Incompetency of the Husband and Wife as witnesses. Chapter X. Privileged Communications. Of the Admissibility of Counsel or Solicitor. Chapter XI. Of Confessions and Hearsay. Chapter XII. Of Hearsay. Chapter XIII. Of the Examinations of Witnesses at Common Law. Chapter XIV. Of the Examination of Witnesses in Equity. Chapter XV. Of the Examination and Cross-

book indicates his method of treatment of the subject and will give the general reader a good idea of his philosophical and logical style:

The conclusions to which I have arrived are these:

All persons, without exception, who, having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses.

Objections may be made to the credit, but never to the competency of witnesses.

While the best evidence should always be required, the best existing and attainable evidence should not be excluded, because it is not "the best evidence of which the case in its nature is susceptible."

The best mode of extracting testimony, orally, in public, and before the tribunal which is to decide upon the facts in dispute, should be adopted on all occasions, and before all courts, when practicable. The only exception to the universality of this rule is one arising from special delay, vexation and expense in its observance; as, in case of sickness, or the absence of witnesses.

Many of the errors in the law, here pointed out, have been corrected. Many of the reforms, here suggested, have been partially adopted. Interest and infamy in very many of the states have ceased to be grounds for the exclusion of testimony. A limited admission of the testimony of the husband and wife, has been allowed in cases in which one or the other is a party. The

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examination of witnesses in Law and Equity, as to facts which may tend to expose them to penalty, forfeiture, or punishment. Chapter XVI. Of Judicial Oaths.

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parties in civil cases with greater or lesser restrictions upon their testimony have been received or compelled to testify in their own cases. In offenses of the lowest grade of criminality the accused in one state has been admitted as a witness in his own behalf. But incompetency from defect, or a want of religious belief, is still the law in most of the states. The communications between client and attorney remain privileged. The law as to confessions and hearsay continues in a condition preëminently chaotic. Different courts, and the same court on different occasions, employ differing modes of extracting proof. Much, therefore, remains to be done.

So far as changes have been made, their practical working in the administration of the law has been such as to make it a matter of astonishment, how courts could have ever hoped to administer justice when the evidence now received was excluded.

The importance of the subject is commensurate with the importance of justice itself. Without evidence, or with bad rules, the judge of fact is as powerless to do justice, as the Hebrew of old was to make brick without the needed straw. In what I have done, I have only endeavored to apply the reasoning and principles of Bentham, of which I have made free use, to the law as found in the treatises of juriconsults and the decisions of courts; and if I shall have aided in accomplishing the changes, which I regard as necessary and indispensable, I shall be abundantly rewarded for my labors.

It must not be supposed that so important a change did not encounter opposition. On the contrary, the hostility was active and lively. It was not adopted generally until time and experience in Maine and England had proved it to be wise and salutary. As illustrating the character of this opposition, the following incident told by the judge himself will be interesting:



But the bar were not alone smitten with the terror of change. Many years ago I sent to the editor of the *North American Review* — a learned professor of the leading university in this continent — a review of Greenleaf's treatise on Evidence, criticising the work, and advocating the general principle that all who can perceive and perceiving can make known their perceptions to others should be received as witnesses to make known their perceptions, leaving their force and effect to the tribunal whose duty it might be to judge of their trustworthiness of testimony. The article was sent back as dangerous and inflammatory in its character, with the courteous and complimentary suggestion on the part of the professor that he should as soon think of turning a mad bull loose in a crockery shop as aid in spreading such heresies. But it was published in another review where the editor was less timorous. Some of the cracked earthenware now in the shop has been demolished, more should be — the china is safe.

As Judge Dillon aptly says in his *Laws and Jurisprudence of England and America*, "Reform is a plant of slow growth in the sterile gardens of the practicing and practical lawyer." Perhaps the lawyer is usually wanting in the necessary perspective to make him a judge of the value of a proposed change in the law. At any rate, it was not until 1848 that the initial step in the United States occurred. That step was then taken in a somewhat limited form in Connecticut, and by Maine in 1856 by the Act of April 9th, Chapter 266:

Sec. 1. No person shall be excused or excluded from being a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as party or otherwise, except as herein otherwise provided; but such interest may be shown for the purpose of affecting his credibility.

Sec. 2. Parties shall not be witnesses in suits where the cause of action implies an offense against the criminal law on the part of the defendant, unless the defendant shall offer himself as a witness, in which case the plaintiff may also be a witness, and in case the defendant in such suit shall offer himself as a witness, he shall be held to waive his privilege of not testifying when his testimony might render him liable to prosecution for a criminal offense.

The other provisions of the act exclude from its operation wills and other instruments which by law were required to be attested and parties prosecuting or defending as representatives, such as administrators, executors, etc., or made parties as heirs of a deceased party; but it was further enacted that "the rules of evidence in special proceedings of a civil nature such as before referees, auditors, county commissioners, courts of probate shall be the same as herein provided for civil actions."

As has been said, this was the initial step. It was amended year by year until the field of its operation became broadened and made into a generally accepted code. It was soon adopted in New York with the friendly and efficient aid of David Dudley Field when revising the code of that State and who early appreciated the merits of Chief-Justice Appleton's labors. Their correspondence, if space permitted, would be interesting and instructive. Other states followed and the admission of parties to testify in their own cases became the law of the land.

But it will be observed that the change in the law thus far related only to civil cases. Persons charged

with crime except petty offenses were still debarred from testifying in their own behalf. Chief-Justice Appleton did not rest contented with this situation of the law but urged that another change should be made and respondents in criminal cases be permitted to testify. As often as occasion occurred he did not fail to point out the absurdity and injustice of leaving the principle for which he contended only half accomplished.

The last step was finally accomplished and the Maine Legislature by an act approved March 24th, 1864,<sup>2</sup> enacted the following statute:

Sec. 1. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his own testimony being left solely to the jury under instructions of the court.

Sec. 2. Nothing herein contained shall be construed as compelling any such person to testify.

The passage of the law was a great triumph for the Chief-Justice and the friends who espoused his views. His happiness was plainly visible as he showed them a telegram he had received from Honorable Lewis Barker, announcing the passage of the bill:

To Chief-Justice Appleton, Bangor — The bill has passed. I thank God that the padlock has been removed from the lips and that citizens accused of crime may hereafter testify in their own behalf.

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<sup>2</sup> Chapter 280.

This act somewhat condensed remains the same to this day with the modification that the fact that the respondent does not testify in his own behalf shall not be taken as evidence of his guilt, and he shall not be compelled to testify on cross-examination to facts that would convict, or furnish evidence to convict him of any other crime than that for which he is on trial.<sup>3</sup>

After many states had adopted the legislation of Maine, it was followed by an act of Congress July 16th, 1862,<sup>4</sup> by which it was provided that "the laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and in admiralty." This enactment of Congress was but the natural and logical outcome of the action of the states and became necessary in order that there should be a uniform rule in regard to the competency of witnesses in both Federal and State Courts in the same state. *Res ipsa loquitur*.

The rule of competency of witnesses embraced all persons. It had no exception. No one was to be excluded on account of race or color. The rule, as before stated, provided that:—

All persons, without exception, who, having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses.

<sup>3</sup> Revised Statutes, State of Maine, 1903, Chapter 135, Section 19.

<sup>4</sup> Statutes at Large, vol. XII, 588.

Its application to colored persons arose as soon as Congress began to legislate on emancipation, confiscation, the judiciary and competency of witnesses and other cognate questions arising as early as 1862. Senator Sumner the constant champion of the slave sought in the United States Senate by amending pending bills to enforce the rule.<sup>5</sup> The Senator well said "in lending the sanction of the United States, even indirectly, to an exclusion founded on color, all people have been made parties to injustice." On February 29th, 1864, he made a full and exhaustive report to the Senate on the subject:<sup>6</sup>

In our country it (exclusion of witnesses) has been treated . . . in a series of masterly essays on the law of evidence by the present learned Chief-Justice of Maine, Honorable John Appleton.

And to add weight and strength to his own report he had annexed to it "a recent letter from this distinguished authority on the exclusion of colored testimony." The concluding portions of this letter are here given:

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<sup>5</sup> The interested reader will find a full account of this in, *The Works of Charles Sumner*, Boston, 1874, vol. VI, 442, 502; vol. VII, 152; vol. VIII, 176; vol. IX, 59. 38th Congress, 1st Session, Reports of Committees, No. 25, 11.

<sup>6</sup> By our treaty with Mexico, by which we obtained California, we guaranteed that citizens of the ceding republic should have equal rights with those of the republic to which the cession was made. Yet the moment California became ours, the negro and the Indian, though citizens of the ceding republic, and by their laws witnesses, were at once deprived of testimonial capacity.

The need of this testimony becomes still more apparent if it be the design of government to enforce its own laws. If half the population of a state capable of being witnesses were to be excluded on account of size or sex, how manifest it is that with such exclusions the attempt to do justice would be almost hopeless. Color affords no more logical reason for exclusion than size or sex.

In controversies between those of the white race, it is not a matter of privilege to the black man, who has no interest in the controversy, that he be permitted to testify, any more than it would be to the white man under like circumstances. If being a material and needed witness, either is excluded, it is the cause of justice that is endangered. Justice is equally denied when suitors are refused access to her temple, as, when having access, they are prohibited the use of the testimony by which alone right can be established.

But why not hear this testimony in suits between, or in prosecutions against, white persons? It is none the less needed because the parties are white. Is the judge of fact, howsoever called — chancellor, judge or juryman — any the less able to weigh the evidence of black persons because the color of the parties litigant differs from that of the excluded race? Self-satisfied with his ability to judge of the trustworthiness of black witnesses, when the parties are of the same color, does his judicial ability vanish upon a change of color on the part of the suitors? Receiving this testimony with parties of the black or Indian races, and weighing or assuming to weigh it, cannot he do the same thing when white men are litigating before him? The judge competent for his position, is he so afraid of the seductive influence of black witnesses that he will not trust himself to hear them? Is the black man more untrustworthy when parties are white than when black? Is he more deceptious? Does the ability of the judge vary with the varying races and conditions of those to whom he is meting out justice? If not, then he can weigh this testimony as well when one race is litigating as another, and it has been

seen he has no scruple to use it where the parties and the witnesses are of the same color. The real danger is not of undue credence, but that, hearing, the judge will not give it the weight to which it is justly entitled. But that objection is not open to the advocate of exclusion, who protests that it is so utterly unreliable that he is unwilling even to hear it.

Exclusion, let it be remembered, depends not on the status of the witness, for free blacks and slaves are alike admissible for or against those of their own race, whether bond or free. Where the rights of the dominant race are involved, the black, though free, is excluded. The admissibility of witnesses is made to depend not upon their condition, but upon their color alone.

No other instance can be found in the legislation of any nation, civilized, semi-civilized, or barbarous, in which free men have been rejected as witnesses because of their color. By the civil law slaves were not admitted to testify. Such, too, is the Mahometan law on this subject. But the exclusion is limited to the slave. When free, he is at once a competent witness, irrespective of his color or his descent.

The negro and the Indian are excluded on account of color. After successive intermixtures of their races with the white, varying in the different states, their descendants are received. The white race being regarded as the type of truth, the more it is intermingled with the degraded castes, the more trustworthy the witness—the mulatto than the negro, the quadroon than the mulatto—till, at length, after sufficiently numerous acts of illicit intercourse, continued through successive generations, testimonial trustworthiness is restored.

The exclusion of evidence is the unmistakable proof of deficient civilization. The barbarian refuses to have witnesses, and resorts to ordeals by fire and by water. Unwilling to trust his own judgment, he is willing to trust to chance. He prefers exclusion to investigation. Rather than weigh testimony he would reject it. He excludes the Mahometan, and is in return excluded by him, and for the self-same reason that the belief of the judge

excluding differs from that of the witness excluded. Of all exclusions, the one most libelous upon humanity, most blasphemous to Deity, is that by which whole races of men are prohibited from testifying on account of their color, as if mendacity was the result of their having a greater amount of pigment cells, and a greater number of cutaneous glands; as if the Almighty had so failed as to have created whole races of men so untrustworthy that it would be unsafe even to hear their testimony. But barbarous methods for the investigation of truth recede before the advance of civilization. The ordeal has passed away. The judicial lot has ceased. Interested witnesses are received. The Christian hears the Mahometan, and whether the Mahometan reciprocates depends upon the distance he has receded from barbarism. Testimony is judged by weight, not by count — after, and not before and without hearing. I trust the time will soon come when it will cease to be a reproach to this age and nation that whole races of men are prohibited from testifying, not from any fault of theirs, but because God in his wisdom has seen fit to impress upon their form a browner or blacker skin than upon the bodies of the race by whose legislation they are excluded.

The change thus recommended in Senator Sumner's report, and vigorously advocated in Chief-Justice Appleton's letter written a month before the report came from the committee, was adopted by Congress July 2d, 1864.<sup>7</sup>

It is proverbial that great bodies move slowly. It was not until 1878 that Congress supplemented its

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<sup>7</sup> It may be found in Sec. 3, of Chapter 210, vol. XIII, 351, Statutes at Large and is in these words: . . . "Provided, that in courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue to be tried."



legislation and took the last step, allowing persons charged with crime to testify in their own behalf.<sup>8</sup>

The history of these beneficent changes in this branch of jurisprudence has been thus given in full because it is so little known that credit is not given where it belongs. It is hardly possible to give too much credit and praise to Chief-Justice Appleton for the work he accomplished in this respect. His labors, both with his pen and by personal influence, cover a period of nearly fifty years. He was a leader of leaders. The world of jurisprudence owes him a debt of gratitude. History will not fail, if it is philosophy teaching by example, to record how well this great man served his day and generation, and how much he added to the "glad-some light of jurisprudence."

After residing six years at Sebec, he then removed to the City of Bangor and in 1832 entered into partnership with his future brother-in-law, Honorable Elisha H. Allen, under the name of Allen & Appleton and acquired an extensive practice. This firm continued until Mr. Allen was elected to Congress

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<sup>8</sup> This appears in Chapter 37, vol. XX, Statutes at Large, 30, in the Act approved March 16th, 1878:—Be it enacted, etc., "that in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

in 1840. Mr. Allen subsequently became Chancellor of the Sandwich Islands and Minister of Hawaii to the United States. After the retirement of Mr. Allen, Judge Appleton had as a partner Mr. John B. Hill. Later he formed a partnership with his cousin, Moses L. Appleton, and this last partnership continued until 1852, when Judge Appleton was appointed a Justice of the Supreme Judicial Court.

Clientage in those days was large—hundreds of suits in each term being intrusted to his firm. On account of the insolvency of the times, collections were made largely by suits. Fees were small. "In respect of experience and multiform legal knowledge," as the Judge once naïvely said of his practice, "it was largely remunerative." The research and activity which it stimulated, placed them in the very forefront of the legal fraternity.

What the advocate should be in the mind of this able lawyer he tells us in a beautiful tribute to the memory of one of his associates upon the Maine Bench, Honorable Edward Kent, in which he unconsciously has given us a pen-picture of himself. He says:

As an advocate, he was earnest, fluent, a thorough master of the facts to be discussed, omitted nothing which could conduce to the result sought to be attained. Judicious, frank and open, scorning all artifice and concealment, despising all trickery, he addressed himself to the merits of his cause, and to the calm judgment of the jury. His commanding presence, the recognized purity of his life and the integrity of his character, gave force

and strength to an argument in itself forcible and strong without the added weight of those great accessories.

Of Judge Appleton himself at this period of his life, Franklin A. Wilson says:

He was in the full vigor and prime of life, graceful in motion, eloquent in speech, persuasive and successful; and to my youthful mind he seemed to be preëminent in a bar which contained lawyers of such ability and learning as Edward Kent and Jonas Cutting, both of whom were afterwards associated with Chief-Justice Appleton upon that bench of the Supreme Judicial Court of Maine. The effects of his argument at that time upon me I easily recall, and I did not fail to notice similar effects in the case of the spectators around me, as well as upon jurors. His services were in demand upon one side or the other of almost every case tried in the Court at that time.

He was industrious and tireless. A physical system, naturally strong and well-cared for, enabled him to accomplish great tasks professionally without apparent fatigue.

From that period up to the day of his death, during the remainder of his professional career, and all his judicial life, as well as during the period of his well-earned rest and retirement from judicial labors, I was first his acquaintance, then his young friend, then his younger brother in the profession, and always his admirer.

As all these elements of temperament, training and character enter into the foundation and success of his judicial career in after-life, and to enable us still better to appreciate them, we will quote the words of another, couched with deeper analytical power and written by an acknowledged master of the subject,—an active practitioner before him and his associate on the bench for upwards of ten years,—his successor, Chief-Justice Peters:—

By the oldest of us, he is remembered as a prominent member of the bar before going upon the bench. I have a vivid impression of him, and other leaders of this bar, as I first saw them during a trial term of the court during a year, and that would necessarily be prolonged and arduous. In that year I was admitted to the bar, and became much interested in distinguished lawyers and advocates in this bar at that time, with some illustrious as well as unique figures in the group, but no one of them possessed a better professional aptitude or had attained a better professional fame than John Appleton.

His professional efforts were characterized not so greatly by much variation in the exhibition of ability, as by an even and uniform excellence. His management of causes was reliable, safe and successful. He was deeply interested in the work in hand. The court room seemed a home to him, and the trial of a cause an apparent delight. Possessing then, as afterwards, fine physical health, his powers of both mental and bodily endurance were simply marvelous. He would pass from case to case, entering upon one trial with the same zeal and vigor he had just expended upon another, whether his previous efforts had been attended with victory or defeat. He did not forget that a battle well-prepared is half won, and he was a master of the principle of promptness to the end of his life. He was active in both the preparation and the execution of business. I should doubt if he ever asked for the continuance or postponement of a case in court for his own personal convenience.

Industry can accomplish all possibilities, and the key to industry is the love of work. "To business that we love we rise betime, and go to 't with delight," are the words of the master poet. And still neither at the bar nor upon the bench was Judge Appleton impatient with the movements of others because slower than his own; nor was he hasty or hurried in the performance of his own tasks. He kept, however, constantly employed, catching the inspiration of Goethe's motto, "Haste not, rest not." He was distinguished for his preparation of the law of a case,

as well as of its facts, and his opponents learned to be on the look-out against his assaults and surprises. He continued the same studious, active, attentive and successful lawyer until he exchanged his duties at the bar for those of the bench.

The bench is what the bar chooses to make it. This tireless, hard-worked lawyer did not forget what he owed the profession in this respect. The two fundamental reforms which he largely assisted in bringing about are those relating to the abolition of the District Court and the removal of the disability of parties as witnesses in their own cases. Notwithstanding the great eminence he acquired as a judge, I think he took nearly, if not fully, as much satisfaction to himself in seeing his advanced views adopted by the legislature.

While at the bar he moved and promoted the plan of consolidating the District and Supreme Judicial Courts, by abolishing the one and concentrating in the other the jurisdiction belonging to both; also consolidating into three districts the law court which sat in each county. He was chairman of a commission appointed by the legislature to consider and report a plan, and drafted the act by which the present system was established in 1852. Of these labors he has said, since he retired from the bench:

The delays incidental to and resulting from two Courts with appeals to and exceptions from one to the other, led to the entire transference of the jurisdiction of the District to that of the Supreme Court, with a saving of the delay, expense and vexation incident to protracted litigation; so that I think it may be truly said that there is no State in New England where a judgment

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may be obtained so speedily and with so little expense as in this good State of ours, when parties and counsel desire it.

At the time (1883) when he thus spoke there were only 950 actions pending on the docket of the Supreme Court, whereas a few years after he began practice at Bangor (1837) there were 1,484 actions on the docket of that Court, and 3,512 actions on the docket of the District Court. While he modestly attributes the result as due to the prosperity of the times, the community at large did not fail to see that it was largely due to the reform he had brought about by which, in the manner indicated, the courts were consolidated.

Although a Whig in his political preferences, he was appointed to one of the new places upon the bench of the Supreme Judicial Court by Governor John Hubbard who was a Democrat. The appointment was made in recognition of his ability and character and in response to the general demand of the bar of the State—a demand not always heeded by the ready-made clothing executives of later days, who consider judicial appointments in the light of political plunder. There is every reason to suppose that neither he, nor any of his friends, anticipated or even thought of the appointment until after his duties on the commission had been fully performed.

The term of judicial appointments in Maine is seven years. Reappointments are a matter of course where the judge serves with a general acceptance to the members of the bar and to the people. His

first appointment was May 11th, 1852, and he became Chief-Justice October 24th, 1862. He remained on the bench until September 30th, 1883. To quote again the language of his successor, Chief-Justice Peters:

He left not a stitch of his own work for a successor. Duty performed, fully, satisfactorily, grandly performed, was the spontaneous exclamation of the State, as it reluctantly and sorrowfully yielded to the supposition that his great age, then nearly eighty years, rendered it probable that his health and strength would not endure through an additional term of seven years.

During his thirty-one years' service on the bench, it may be said that he had no friendships and no enmities. He endeavored to mete out impartial justice; protecting the young and inexperienced in his beginnings, and giving to the veteran experienced in forensic strife no more than his just rights. He shrank from no labor, nor evaded any responsibility. It is easy now to see that he would bring to the bench the same industry that marked his life at the bar. And such was the fact. This talent, almost amounting to genius, enabled him with an extraordinary, quick intellect to dispatch easily a large amount of business. He carried the same degree of zeal into his written opinions; and there, aided with a masterly knowledge of authorities, he was able to dispose of law cases with promptness. His motto in this respect was *Nulla dies sine linea*. Buffon says "the style is the man;" so his written opinions often resemble himself in clear and forcible expres-

sions, rising at times to a spontaneous grace of composition.<sup>9</sup>

While there is never any acerbity or want of true judicial dignity in his written opinions, there is an occasional light and harmless touch of playful humor to be found in them, and by means of which the practitioner can instantly recall the point decided. It is the overflow of the full mind and a genial temper,—his humor is “strength’s rich superfluity.”

Thus in *Mayo vs. Hutchinson*,<sup>10</sup> he says:

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<sup>9</sup> This together with their wide range of topics, will be found in the following cases, all treating important questions which excited great public interest: *Donahoe vs. Richards*, 38 Maine Reports, 379 (1854) in which the court held that a school committee are vested with quasi-judicial powers not subject to revision by the court when honestly and fairly used.

Opinions of the Justices, 44 Maine Reports, 521 (1857), relating to the case of *Dred Scott*. Judge Appleton wrote a separate answer containing a masterly grasp of the law, history and research of authorities. His fame as a jurist might well rest alone upon this single opinion as a good example of the breadth of his learning, ready application of authorities, and soundness of judgment.

A leading case often cited in other States is *Allen vs. Inhabitants of Jay*, 60 Maine Reports, 124 (1872). It holds that towns, as municipal corporations, are not constitutionally authorized to loan their credit to individuals to engage in manufacturing, or other private business.

Another important case, involving the taxing power, is *State vs. Maine Central Railroad Company*, 66 Maine Reports, 488 (1877). The defendant corporation claimed that it was exempted from taxation under a consolidation act, but the court decided otherwise; holding in its opinion that a surrender of the taxing power by the State can be established only by the most clear and explicit language. The student of history will find these opinions are landmarks in the growth of American jurisprudence. The last-named case was affirmed by the United States Supreme Court on an appeal, and is reported in 6 Otto’s Reports, 499.

<sup>10</sup> 57 Maine Reports, 546, 547.



Almost all who sign as surety have the occasion to remember the proverb of Solomon: "He that is surety for a stranger shall smart for it, and he that hath suretyship is sure." But they are nevertheless held liable upon their contracts, otherwise there would be no smarting, and the proverb would fail.

In overruling a faulty plea in abatement tendered by two defendants who used interchangeably the singular pronoun "he" with the plural "they," he concluded with the scriptural injunction, "Wherefore let him that thinketh he standeth take heed lest he fall." He disliked tobacco, but appreciated the uses of the cigar. In an action upon a receipt to the sheriff who had attached some fragrant Havanas and which were not forthcoming to be sold on execution, he remarks, as if glad they no longer existed:

The five thousand Spanish cigars were sold; each had accomplished its destiny,

*"tenuesque recessit  
Consumpta in ventos."*

He rarely gave a dissenting opinion; but one of them, published after his retirement from the bench, *State vs. Harriman*,<sup>11</sup> deserves notice because of its strong sense and the wide publicity which it attracted at the time—1884. Its learning, vigor and humane touch will commend it to all readers. The case came before the court in banc on exceptions by the respondent to the ruling at *nisi prius* in overruling a demurrer to the indictment. The indictment charged the respondent, under the provisions of Re-

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<sup>11</sup> 75 Maine Reports, 562.

vised Statutes, 1883,<sup>12</sup> with killing a dog. The full court held that dogs are not recognized in the law as belonging to the class denominated "domestic animals" and that one cannot be convicted under this statute (which relates to killing or wounding of domestic animals) for killing a dog. The Chief-Justice filed his dissent from this doctrine and said, among other things:<sup>13</sup>

The main question is whether a dog is a "domestic animal," for if he be, the defendant is guilty by his own admission and should be held criminally liable.

A dog is the subject of ownership. Trespass will lie for an injury to him. Trover is maintainable for his conversion. Replevin will restore him to the possession of his master. He may be bought and sold. An action may be held for his price. The owner has all the remedies for the vindication of his rights of property in this animal as in any other species of personal property he may possess.

He is a domestic animal. From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been there has been his dog. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master — accompanying him in his walks, his servant, aiding him in his hunting, the playmate of his children — an inmate of his house, protecting it against all assailants.

It may be said that he was *feræ naturæ* but all animals, naturalists say, were originally *feræ naturæ*, but have been reclaimed by man, as horses, sheep or cattle, but however tamed,

<sup>12</sup> Chapter 127, Section 1.

<sup>13</sup> Citing Kent's Commentaries, vol. II, 349.

they have never like the dog, become domesticated in the home under the roof and by the fireside of their master.

The dog was a part of the agricultural establishment of the Romans and is treated of as such. There were the *canes villatici* to guard the villa of the Roman senator, the *canes venatici* accompanying him in his hunting expeditions, and the *canes pasttorales* by whom his flocks were guarded. Virgil in his "Georgics," has given direction as to their management and education. To-day, in many countries they are used for draught, as in France and Holland, and everywhere regarded as possessing value, and as the subject matter of traffic.

The language of the statute is most general, "any domestic animal." The words are not technical or words of art. They are the words of the common people and should be construed as such. Nothing would more astonish the people for whom the laws are made than to learn that a bull or a hog was a domestic animal and that a dog was not.

The lexicographers define a dog as a "domestic animal." "A well-known domestic animal." Johnson's Dictionary. "A well-known domestic animal of the genus *canis*." Worcester's Dictionary. In Bouvier's Law Dictionary, he is defined as "a well-known domestic animal." Otway the poet, says of them,

"They are honest creatures  
And ne'er betray their masters, never fawn  
On any they love not."

So, in the encyclopedias he is *canis familiaris*, and called a domestic animal; so that in the ordinary use of language he is within the clear provisions of the statute under which this indictment was found. "The domestic dog has occasioned many legal disputes and the presumption of the common law of England is that he is tame." Campbell on Negligence, sec. 27. . . ."

In the present case the Newfoundland dog, "Rich," of the value of one hundred dollars, was "in the inclosure and immediate care of his master." He was domesticated.

Whether the property of the master was originally of a quali-

fied nature or not is immaterial. The dog was under his dominion and control. "While this qualified property continues, it is as much under the protection of law as any other property and every invasion of it is redressed in the same manner."

He never showed temper or irritability. He was a model in this respect. This important factor in the life of Chief-Justice Appleton is finely delineated by his successor, the late Chief-Justice Peters, in the following words:

Another dominant element in Judge Appleton's character—both an intellectual and moral power—was temperament. This is a product of all the elements of character blended together,—a balance-wheel that guides them all,—an indicator of the general character. He was a person of even and unruffled temper, courteous and kindly in all places and conditions. He was utterly unconscious of prejudice or resentment against any one. He was more likely to see the good side of men than their faults. He was tolerant of the views of those who did not agree with his own. During the almost half-century that I knew him I never heard an angry word from his lips. Charity, sympathy, liberality, courtesy, forbearance, lenity, and kindred qualities were elements in his disposition. Not that he did not have firmness. Gentleness is the sure evidence of firmness. He possessed good-natured firmness and perseverance in an uncommon degree. The secret of his calmness and self-control was the happy instinct born in him not to be worried at what could not be helped. He used to say, when he had affliction or trouble, it was providential that he could become absorbed in work. More the trouble, more the work. It is worry more than work that wears out a man. "It is not the revolution that wears out the machinery, but the friction," says some writer. The life-work of Judge Appleton was a machinery that ran without much chafe or friction.

He trained himself to look upon the best side of

men at all times, thus no record remains of words sharp and caustic only for their wit. Yet he could give and take a good joke. We give a few illustrations: Said a merchant to the Judge, "This bankrupt law is robbing our firm of thousands of dollars." "Oh no! neighbor Jones!" replied the Judge, "it is the insolvency of your debtors." During an intermission of the law-court, just after the long and somewhat tedious pauper case of *Alton vs. La-grange*, the Chief-Justice turned to his associate on the bench, Judge Kent, and remarked, "I think the pauper in this case, Rand, was once a client of mine." "And that is the reason probably why he is a pauper now," quickly added Mr. Justice Kent.

A master in chancery once asked his opinion of the reasonableness of a certain lawyer's account for services rendered in a case. The lawyer was noted for his knowledge of all the fee table and his claim was objected to as being excessive. With a twinkle in his eye the Judge answered, "Well! I think Brother C. is reliable in his charges."

His definition of the "independent" in politics is too good to be lost. He defined them thus: "They are the kind of politicians who go with you when you do not need them, but are sure to be against you when you want them."

Another of his sayings in the days of reconstruction was:

To argue that a State cannot go out of the Union is as much as saying a man cannot commit murder because it is forbidden.

His good sense is tersely expressed in a letter to Senator Fessenden, Chairman of the Committee on Reconstruction, who wrote the report of that committee in 1866.

Chief-Justice Appleton to Honorable Wm. P. Fessenden.

BANGOR, 11th March, 1866.

MY DEAR FESSENDEN:

Many thanks for your excellent speech. I am at a distance from the center of political affairs, but my anxiety is intense. To what are we coming? Is the reign of chaos and old night to succeed? The states cannot be kept out long! It will be impossible. To give the South representation upon the basis of the whole population is a deliberate transfer of political power to the South, now and for an indefinite future.

The Constitution as to the question of negro suffrage can never be changed after the Southern states come back — at any rate not earlier than the millennium — of the coming of which the prospect is not immediate. The change proposed if not all that is desirable would by indirection accomplish that result, and the result is what we are after. Now what in the name of Heaven is Sumner thinking of! He makes a speech which every Copperhead from the Sabine to the Saint John would denounce. He gives a vote which they hail with delight.

You must have a proposed amendment — as a *sine qua non* — to go before the people. Why not take Doolittle's proposition? The basis of voters is a fair one — no matter how it affects particular states. The people will sustain it. Indeed when I consider the evasions and the frauds which might be perpetrated under Blaine's proposition, why is it not preferable?

Sumner forgets that Slavery is abolished only by war and nothing else. I won't bore you with but a word, so am in haste and most truly yours,

JOHN APPLETON.

No sketch of this great man would be perfect without some reference to another trait in his character, his kindness to young men of the bar. He will always be remembered with affection for this endearing characteristic.

Besides his vast labors, which of themselves have given him a permanent place in the judicial records, an enduring monument, this side of his character, his interest in and love of young men is worthy of perpetual remembrance. Such is the opinion of another fully competent to speak.

LEWISTON, November 11, 1890.

*Honorable Charles Hamlin.*

DEAR SIR: One of the loveliest traits of the character of Judge Appleton, was exhibited in his uniform courtesy towards younger members of the profession.

I never shall forget how he lifted me once from the slough of despond. I had never tried a case in court, was exceedingly nervous about making the attempt, and relied entirely upon my partner, Mr. Fessenden. One day a case was called in which we were counsel, and, to my horror, word was brought to the court house that Mr. Fessenden was sick and would not be able to be present. I asked for a continuance, which the Judge, in the kindest manner possible, declined to grant; called me to him and said, "Now, Frye, this is your opportunity. You can, if you please, try a case as ably as any man at this bar. I will see that you have perfectly fair play, and it will be a little strange if you and I together fail to secure for your client justice." We succeeded, and in his charge to the jury, Judge Appleton paid me a very high and, undoubtedly, an entirely undeserved compliment.

After that experience, I tried my own cases, and whatever success I may have achieved, has been largely due to the Judge.

From that day to this I have been his constant and enthusiastic friend and admirer.

Very truly,

WM. P. FRYE.

While daily cultivating and enjoying his love of classical and current literature, it is easy to see that he also would sympathize with Sumner and John Stuart Mill on questions of national and international interest; that he did not hesitate to speak of the duty of citizenship; upon slavery and war; partaking as Burke says of "that spirit of observation and censure which modifies and controls the whole government." He corresponded for years with Mill, having early learned that he too was imbued with the spirit of Bentham and had pronounced his *Rationale of Judicial Evidence* "one of the richest in matter of all Bentham's productions."<sup>14</sup>

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<sup>14</sup> Autobiography, John Stuart Mill. Henry Holt & Co., 1873, p. 116, et passim. Mill was the most pronounced friend and advocate of the United States during the Civil War of the rebellion. One of his letters to the Chief-Justice, written after Gettysburg and Vicksburg but before the Wilderness and Sherman's March to the Sea, is here given as a valuable contribution to the history of the times: —

"SAINT VERAN, AVIGNON, September 24, 1863.

DEAR SIR: Though I did not immediately answer your letter of July 18, it was by no means, for want of being greatly interested by it. But it so exactly coincides with my own interpretation of passing events, as to leave me hardly anything to say. I have just been reading it again, for the third or fourth time since I received it, and I find that we think alike on every point which you touch upon. This cannot but confirm me very much in my way of thinking. But indeed the true nature of all that is going on in America just now, is so simple and obvious, that to see it as it is, requires only that one should not be totally ignorant of American affairs during a few years



As his near neighbor for twenty-six years and a practitioner in his court for more than thirty years, I soon came to learn that he had besides his love for his profession, a love of books and so the literary side of the genial man soon disclosed itself. Looking back over the experience and the many hours of enjoyment with him among his books, I remember that he seemed to me to be the best informed man of his day on all subjects. He made all subjects tribute to his knowledge. He was an omnivorous reader. Better than all this he was fond of telling all his

before the secession. As almost every body here, from the prime minister down to the smallest newspaper scribe *is* thus ignorant, they naturally see, in what is now going on, only what their wishes or their prejudices prepare them to look for. The general direction of the sympathies of nearly all classes here, except the working and the better part of the literary class, is disgraceful enough to this country. But things are mending a little. The worst enemies of America are becoming convinced, that it will not do to let any more Alabamas go out from these islands. It is curious to see the *Times* daily arguing, in total opposition to its former doctrines, that to allow vessels of war to be in substance even if not literally fitted out in this country for a belligerent, is *wrong*, as well as inexpedient. The government as a government, has always been better than the public in all that relates to this contest;—and I am persuaded that this country will not give you any serious cause of complaint against its conduct, but only against its inclinations. Some members of the government, too, have been, all along, warm friends of the cause. The Duke of Argyll and Milner Gibson, have not disguised it in their speeches; and my opinion is that even Lord Russell is more with the North than against it. The sentiments of the others will, I doubt not, be very greatly modified by your success of which there can now be little doubt, from the gradual but constant progress of the Northern arms, the increasing exhaustion of the South, and the dogged pertinacity of which no one originally ventured to give the people of the Free States credit for as much as they have shown. Complete victory may not yet be very near at hand, but it is a consolation to think, that provided the

friends—especially the young men—what he had been reading, discussing the merits of the authors and comparing them with writers of his first acquaintance. These traits of his character appear in a letter to his oldest son, General John F. Appleton, afterwards United States District-Judge, Texas, who died in 1870. This letter, one of the most beautiful that I have the good fortune to possess, is reproduced here in full containing, as it does, ample proof of the rich qualities of the head and heart of the father.

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success *is complete at last*, the longer the war continues, the less possibility there is of a compromise preserving slavery, and the more thoroughly the war will have become one of principle, tending to elevate the national character.

“The thing I most wish to hear from you now, is what you and men like you, are thinking about the mode of settling Southern affairs after the war. I cannot look forward with satisfaction to any settlement but complete emancipation—land given to every negro family, either separately or in organized communities under such rules as may be found temporarily necessary—the schoolmaster set to work in every village—and the tide of free immigration turned on in those fertile regions from which slavery has hitherto excluded it. If this be done, the gentle and docile character which seems to distinguish the negroes will prevent any mischief on their side, while the proofs they are giving of fighting powers will do more in a year than all other things in a *century* to make the whites respect them, and consent to their being politically and socially equals. Such benefits are more than an equivalent for a far longer and more destructive war than this is likely to prove.

“I am in hopes too, that this great trial of American institutions, which has necessarily brought all that is defective in them to the surface, will have done the work of a whole age in stimulating thought, on the most important topics, among the people of the Free States. I have long thought that the real ultimate danger of democracy was intellectual stagnation; and there is a very good side to anything which has made *that* impossible for at least a generation to come.”

BANGOR, 29th Aug., 1859.

MY DEAREST BOY:

Some thirty-five years ago I purchased these old classics which you will please accept as a birthday present. They were the beginning of what in the course of time has become a large and valuable library. You have in them the ponderous sense of Johnson, the felicitous wisdom of Bacon, the pleasant and amusing chit-chat of Walpole, the quaintness of Cowley, who dreamed that his unread and forgotten epic would bear him down to posterity with Homer and Virgil — the sweet essays of Goldsmith, the freshness of Burns, the grace of Shenstone, the scholarly stateliness of Gray — the dignified propriety of Clarendon and the tenderness and piety of Lady Russell. The collection by the lapse of time is rare. It contains nothing but what is of value and will introduce you to those, who even now are numbered among the old authors of the language.

I would, my dear boy, that I could make you a present correspondent in magnitude and value to the love I bear you. It would be huge in its dimensions and illimitable in its costliness, but you must take the will for the deed and remember that the value in a gift is in the love of the giver and not in the richness of the thing given.

You have reached the years of manhood. Henceforth, legally I cease to have any right to control. But paternal restraint has been so light you will find it difficult to appreciate any difference from the change of relations. Now, my dear boy, the story of your life must depend on your own integrity and sound judgment. Whatever an anxious — perhaps an over anxious solicitude for your prosperity and honorable success can do by giving you the advice of one who has trodden the path of life before — whatever of means in my power to aid you, are at your service and the only regret I have had is that circumstances have made them so restricted.

Upon yourself you must rely. Upon whom else would you? Upon whom else should you? Each generation must bear its own

toils and its own burthens, plant its own fields — and reap its own rewards and gather in its own harvests.

I congratulate you upon your manhood. Your youth has been unstained. May your manhood be without spot and blemish and your old age full of the honors of a well spent life.

Let strict temperance — stern and unwavering integrity and energetic industry be the rules of your life and there is nothing too high or elevated for your hopeful aspirations.

It seems hardly a day since we so gratefully greeted your birth. With equal gratitude we now greet your manhood — the cares and responsibilities of life — and its grave and stern duties are upon you and they must be met. You cannot avoid them without dishonor — you cannot neglect them without disgrace.

I may in many things have erred — if so your filial love will pardon and forget. To whom much is given — of him much is required — and you must remember paternal love is exacting.

We bid you God speed on the journey of life. Be of good cheer. Be always hopeful. Be courageous. The timid and the hesitating begin with failure and they end as they begin. Let your aims be high and elevated and your efforts correspondent thereto — and may the blessings of God and the good will and approbation of all good men and the exceeding love of your father and mother always accompany you and cheer you on.

Ever your loving father,

JOHN APPLETON.

His willingness to impart to others his knowledge of books and his generous desire to have his friends enjoy them with him, became second nature to him.

Before an open fire, surrounded with law papers and all the modern reviews and magazines, he seemed happy to drop his pen, and welcome the caller who could enjoy a good book. With him, books took the place of sports. His heart and mind were so full of

them that I cannot testify to any love he may have had for a horse, hunting, fishing and the fascinations of club life. Even on his travels, which once extended to Montreal, his companion thought a bookstore which he discovered there had more charms than the wonderful tubular bridge.

Welcoming any new star that appeared above the literary horizon, he never forgot his old loves although some of those may have seemed to others to be consigned to the tomb of oblivion. John Galt was one of them. I well remember his commendation of this writer and the pains he took to go to his attic and bring down the "Entail" that I too should know this forgotten novelist.

In 1875 he was appointed by the Legislature to arrange and codify the Constitution of Maine with twenty-one amendments which had been adopted by the people from time to time since its original formation in 1819. This he did with accuracy and skill and his work, with proper titles, side notes and an index, was adopted by the Legislature the next year.

Upon retiring from the bench in September, 1883, he was tendered a reception and dinner by the Penobscot Bar which was also attended by distinguished lawyers from other parts of the State. The speeches then made and his reply were touching and eloquent,—a fitting finale to his long and successful life. After calling attention to the important changes in the law in which he had taken so active a part, and which have so beneficially affected the

administration of justice, he refers to judicial life in the following manner:

The labors of the bench are continuous and increasing. The responsibilities grave. The duties onerous. The subject matters of litigation are co-extensive with the domain of the material and intellectual world. No branch of learning which may not be needed. No amount of labor which may not be required. The great end of judicial proceeding is that justice be done to the parties litigant. The care of the Judge should be, to use the words of an eloquent divine "when he goeth up to the judgment seat, to put on righteousness as a glorious and beautiful robe and to render his tribunal a fit emblem of that eternal throne of which justice and judgment are the eternal habitation." He should seek for the truth. He should present facts as they exist. He would be unfit for his position, if with the added experience of the bar and the bench, he could not better appreciate the force and effect of testimony and the deductions legitimately deducible therefrom than any tribunal selected by lot — composed of men of different pursuits and various callings not disciplined by habits of accurate reasoning and unaccustomed to weigh testimony or the degree of evidence to be given him; and he would be derelict of his duty if he omitted to clearly state to them the evidence and its bearings on the rights of parties — thus aiding the jury in arriving at the truth. One side of every litigation is in the right and the other in the wrong. The Judge should so present a cause that the right and the wrong should appear. The tower of Pisa leaning, justice can hardly be promoted by affirming its perpendicularity. The less is not equal to the greater and the attempt to give the appearance of equality is but injustice.

But it is not for me to speak of my judicial career. Its memory may exist for a brief time in the kind recollections of friends soon with them to lapse into forgetfulness. The labors of the bench have not been irksome. Its investigations not without their pleasure. The severing, and forever, of the occupations

and associations of nearly a third of a century cannot happen without its pains and its regrets. But there comes an end to all things terrene. My successor enters upon the high position I have filled with the good wishes of all. His abundant learning, his unquestioned ability and integrity, his genial manners and that rare tact by which his adverse rulings are made more satisfactory to the losing party than the favorable ones of anybody else to the winning, give ample assurance of a continued career alike honorable and useful.

From my associates on the bench I have ever received hearty aid and coöperation. During my long judicial life, there has never been a thought, much less a word, of unkindness; and it will be long before the State will find more devoted, learned and able public servants. They have my warmest wishes for their happiness and their long continuance in the positions they adorn.

From the members of the bar I have received every courtesy and kindness — every respect and confidence. I tender them in return my grateful thanks and my sincerest wishes for their prosperity and happiness.

He passed the remainder of his life, at home and among friends, enjoying the rich fruitage of an old age respected by the world and loved by all.

Besides his active judicial duties he was constant in attendance as a trustee of Bowdoin College, by which institution he was given the degree of Doctor of Laws in 1860.

He was a regular attendant and supporter of the Unitarian church and a loyal adherent to the preaching of Reverend Doctor Hedge, Professors Allen and Everett, and their successors.

Upon his death, which occurred February 7th, 1891, memorial exercises were held before the full







**CHARLES O'CONOR.**



CHARLES O'CONOR

From an oil painting by Benjamin F. Reinhart, 1877, owned by the New York Bar Association.







# CHARLES O'CONOR.

1804-1884.

BY

HENRY ELLSWORTH GREGORY,

*of the New York Bar.*

THE bench and the bar of the state of New York, since the beginning of the national existence, have been distinguished by not a few men whose lives and labors may truthfully be described as memorable and illustrious. An enumeration of the most eminent of these would include names familiar to every student of American history, while two or three at least have won an international reputation. Others who never sought, or never attained distinction in the wider fields of statesmanship and diplomacy, by reason of their exceptional talents, their professional achievements, their learning, are rightly numbered among lawyers entitled to be called great, and were so regarded by their contemporaries. Among the latter one of the most notable is the subject of this essay.

The sources of information about Charles O'Connor, apart from the reports and legal records, are neither numerous nor copious. Beyond certain short notices in biographical dictionaries, and a few



articles in magazines and periodicals, brief commemorative addresses or essays, there is almost nothing. When we consider the eminence he attained, that he became early one of the leaders, and later the acknowledged leader of the New York bar, and continued in that position for a period of about forty years, it seems more than ordinarily singular that so little has been written about him. Of Mr. O'Connor it may be said, more truly than of the great majority of lawyers, that his life was in his cases; that they constitute his true biography. That Mr. O'Connor himself held this view is shown by the fact that he brought together the papers of his principal cases, had them expensively bound in Russia leather, the whole collection filling one hundred volumes, which, with eight volumes of his opinions, he bequeathed to the New York Law Institute. In these volumes the student may find his accurate and masterly pleadings, his direct examinations and cross-examinations of witnesses, his careful, erudite and exhaustive briefs, with interlineations, notes and extra citations in his own handwriting, incidental references to other counsel, with comments on judicial opinions, and information as to the final disposition of the cases. A monument, indeed, to a long life of incessant diligence and of strenuous contention, indicating, perhaps, an unprecedented loyalty, strong, unwearied and conscientious, to an exacting profession to which he devoted his great powers, his manhood and his life.

There was no legal strain in Mr. O'Connor's ancestry from which the career of a great lawyer might have been predicted. It is stated that he was a descendant of the brother of Roderick O'Connor, the last of the monarchs of Ireland. Charles O'Connor, an antiquary and author of a work on the history of Ireland, was his great-grandfather. His father, Thomas O'Connor, having engaged in the rebellion of 1798, and so made himself obnoxious to the British authorities, emigrated from Ireland in 1801 and settled in New York. He was an educated man of some journalistic and literary talent, and undertook editorial writing for various unimportant periodicals in New York. He married the daughter of Hugh O'Connor, who had preceded him to America, but, it seems, was not related to him. Charles, their first child, was born in New York, January 22d, 1804. His mother died in 1816 and thereafter his home training was superintended by his father. It is recorded that while Charles was still a child, his father employed him to deliver copies of the papers of which he was editor at the houses of his subscribers.

In boyhood, he received almost no education, as the word is understood to-day. The whole time spent in school by him seems incredibly short—certainly not more than six months altogether. The father gave his son some instruction in Latin and possibly French, but by reason of pecuniary embarrassments, was unable to provide him with the

opportunity for securing a more systematic education.

At a very early age his father conceived the idea of making a lawyer of him, and placed him for a time in the office of one of his legal friends, a Mr. Stannard, later with one LeMoyne, and last with Joseph D. Fay, who, it seems observing the industry of the young law student, prognosticated a prosperous career for him. Young O'Connor read and re-read Blackstone until he had mastered that fundamental work. He largely memorized Comyn's Digest, and thoroughly acquainted himself with the works on pleading. While employed with Mr. Fay, he was engaged to conduct unimportant cases in the lower courts, and exhibited such unusual capability that in 1824, at the age of twenty, he was admitted to practice as an attorney.

About the time of his admission to the bar, he was enabled, through the kindness of a friend, to purchase a small library of law books, a treasure indeed to him at that time, the value of which he was prompt to recognize. With these books as his principal asset, he opened an office and began to practice on his own account. The business that came to him was at first not remunerative. Judge Daly informs us that the profession was aristocratic, and a line was drawn between those who had had a collegiate education and those who had not.<sup>1</sup> Mr. O'Connor was obliged to endure and combat the prejudice against

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<sup>1</sup> Magazine of American History, vol. XIII, No. 6, June, 1885.

the son of an Irish immigrant. But the greater the difficulties to contend against, the stronger became his determination to conquer them and to win professional eminence. There is no record or rumor of an indulgence in youthful pleasures; there was no wasting of precious hours in unprofitable diversions. His mind was exclusively occupied with his legal business and the study of jurisprudence. There seems to have been no inclination in any other direction; or, if such inclination existed, it was strongly resisted and suppressed. He was not dependent upon social intercourse, and needed no companions with whom to pass pleasantly the few hours of rest and relaxation. There is something remarkably impressive in the young lawyer's self-reliance—the unvarying steadiness of his purpose, and positive refusal to permit any dissipation of his energies.

It is not to be understood that his career at the bar was signalized from the beginning by a brilliant success. He did not at one bound, while still a youth, leap into distinction. Not by one forensic effort did he impress his name and character upon the bar and the public. The early years were not very different from the early years in the careers of other industrious and earnest young attorneys. There were stern struggles in those youthful years, struggles to maintain his position against poverty and untoward circumstances, in which he waged a grim contest against oppositions of various kinds. Without patronage or privilege, favored neither by for-

tune nor family, with no adscititious advantages, the young lawyer progressed in his profession, relying supremely upon his own firm will. He might have said, quoting Edmund Burke, "*Nitor in adversum* is the motto for a man like me."

Mr. O'Connor chose the law as his profession, not because he had any special predilection for it as an intellectual discipline, or aptitude for it as a vocation. He informed Mr. Bigelow<sup>2</sup> that he could have done as well as a blacksmith, or as a doctor, or as a theologian. The fact seems to be that he possessed what is better and more to be prized than mere talent, or a dominant inclination, or an irresistible tendency toward some particular calling, namely, earnestness, diligence, and an inflexible determination to do his best. In addition to these commendable qualities he had, especially in his youth and early manhood, a physical integument of such soundness and vigor as to make it possible for him to undertake and prosecute with endurance professional labors that would have worn out and prostrated men less fortunately endowed with volitional energy and physical soundness. As far as is known, amid all the struggles and labors, disappointments and postponed successes of his first years at the bar, he never allowed himself to think seriously of giving up his chosen profession and going into some trade or occupation in which pecuniary remuneration might have been more prompt and satisfactory. Rufus

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<sup>2</sup> Century Magazine, vol. VII, new series, 725, 1885.

Choate in the first years of his practice, when clients were few and business insufficient wholly to occupy his time, considered the advisability of renouncing the law. The probability is that Mr. O'Connor, though he may have suffered occasionally from discouragement, and passed through hours of incertitude and depression, never for any long period remained in dubiety as to the direction in which his pathway lay.

It was his invincible confidence in himself, his power of concentration, his pertinacity, and the satisfaction and pleasure that he found in the exercise of his talents in the practice of his profession, that saved him from dejection. He was convinced that to become a competent lawyer he must know not only the fundamental principles of law and the reasons for them, but he must thoroughly master the procedure by which such principles may be practically applied and made effective. Hence, he acquainted himself with pleading and practice as few lawyers have done.<sup>3</sup>

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<sup>3</sup> Mr. James C. Carter said of him: "I believe it would be the deliberate judgment of those who have enjoyed a close acquaintance with Mr. O'Connor and have frequently witnessed his various powers in their full activity and observed the prodigious extent of his acquirements, that he was, all things considered, the profoundest and best equipped lawyer that has ever appeared at this bar, and that he would not suffer in a comparison with the great lawyers of any nation, or any time.

"Certainly we have never known any one at all comparable with him as a draughtsman. His pleadings were beautiful examples of art, and in his later years, when he had more leisure, to draw a bill in equity or an answer, was a genuine delight to him."

His naturally logical mind, having once reached what seemed to him to be the true position, was neither deflected by argument, nor daunted by opposition. If he could not persuade the court that his interpretation and application of the law was sound and correct, his views underwent no change, the court suffered in his estimation.

If he became engaged in a suit, the legal principles applicable to which were less familiar to him than other branches of the law, he did not rest until he had mastered the law relating to the case in hand.

It was, perhaps, fortunate for Mr. O'Connor that he came to the bar at a time when reports were few, when specialization had not become inevitable, and when it was possible for a young man, by diligent study, to master practically all the principles of law which underlie the practice, and which are developed and applied under different forms in all the departments of jurisprudence. If he had not absorbed and assimilated the whole body of the common law, he had at least mastered its principles so thoroughly as to be able to apply them throughout his long life with quickness and precision to almost every case that might arise.

Of the lawyers prominent at the New York bar in the first quarter of the last century, Thomas Addis Emmet was the one who made the deepest impression upon the youthful O'Connor. Emmet was, it seems, an orator of the flamboyant Celtic type, of whom the late Judge Daly said, not with strict accuracy, we

suspect, that he was "the greatest forensic orator the United States has ever known." It was the young O'Connor's delight to listen to the eloquent legal arguments of Emmet, and to follow him from court to court in those early days of his professional career.<sup>4</sup> He never allowed himself to imitate Emmet, and as a speaker, whether at the bar or on the platform, he seems to have had from the beginning an aversion to anything merely declamatory, and to have restrained rigidly any tendency to rhetorical profusion. His style, while not brilliant, has a recognizable excellence. It expresses the thoughts of an orderly and well-trained mind with precision and force. It is an admirable style, well worthy of the attention of students.

In 1824, when Mr. O'Connor came to the bar, New York was a city of about one hundred and sixty thousand inhabitants and the number of lawyers practising in its courts was less than five hundred. Trade was then the principal interest of the male population, as it has continued to be ever since. The city was growing rapidly and its commercial development was attended by a corresponding increase in the business of the lawyers and the courts. Mr. O'Connor could not fail to commend himself to clients by his assiduity, acumen and learning. Gradually his practice augmented in volume, and as early as 1831 he argued his first case in the Court of Errors.

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<sup>4</sup> The New York Law Institute, Report of the Librarian, William H. Winters, 1903.



This was the case of *Bowen vs. Idley*,<sup>5</sup> "the first equity case of any importance" in which he appeared. "I argued it alone in the Court of Errors," he informs us, "never having heard a case argued in that court before."

From that time his professional progress was constant. He was retained as counsel in many of the most important cases in the New York Courts, and advanced rapidly towards the leadership of the bar.

The reputation of Mr. O'Connor, as a lawyer of the highest rank, was greatly extended through his connection with the celebrated *Forrest* divorce case. In this strenuously contested and long protracted litigation, Mr. O'Connor employed his uncommon abilities in such a way as to attract the attention, not only of the community, but also of people of different sections of the country. In the conduct of the suit, Mr. O'Connor displayed, besides his usual tact and skill, the persuasive powers of a great advocate, as well as an extraordinary knowledge of human nature. On account of the public and social prominence of the contending parties and of persons directly or indirectly interested in it, the *Forrest* divorce case was the subject not only of much private discussion, but also of much comment in the public prints. The reports of the proceedings of the trial filled columns in the daily newspapers. The closing address to the jury by John Van Buren, counsel for Edwin Forrest, the defendant, and that of

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<sup>5</sup> 1 Edwards, Chancery Reports, 148.

Charles O'Connor for Mrs. Forrest, the plaintiff, were printed at full length in one of the newspapers. The trial lasted from December 16th, 1851, until January 26th, 1852, when a sealed verdict was rendered. On the morning of January 26th the great crowd about the courthouse impeded the entrance of judge and counsel. The excitement within the court room was repressed, but intense, and according to one account, "Even Mr. O'Connor's stoicism deserted him, and his usually calm spirit now became perturbed." The verdict was in favor of the plaintiff on all points, and was regarded as a notable triumph for Mr. O'Connor.

It was not until 1862, after many delays, that the judgment of the Court of Appeals finally put an end to this wearisome suit. The decree of divorce to Mr. O'Connor's client was sustained, and the allowance of a large sum of money granted to her as alimony was confirmed.

In recognition of his services in this case, sixty members of the bar presented to Mr. O'Connor a handsome silver pitcher, and thirty ladies of New York presented him with a silver vase. These ornamental pieces of silverware are now in the possession of the New York Law Institute, under a clause in Mr. O'Connor's will.

Some years after the conclusion of this suit, in 1876, certain publications in two New York newspapers, reflecting on his character as a lawyer and as a man in connection with the case of Forrest vs.

Forrest, induced him to ask an investigation by a committee of the New York Bar Association. A committee consisting of five prominent citizens met and considered the charges against Mr. O'Connor. The charges were, that he had accepted the office of counsel for Mrs. Forrest with the understanding that he was to perform the services without compensation; that he had accepted the silver pitcher and silver vase above referred to with complimentary testimonials, given under the belief that his services were gratuitously rendered; that after having undertaken to conduct the suit without compensation, he made an exorbitant charge against Mrs. Forrest, and that the charge was paid by her.

The committee reported that there was no evidence that Mr. O'Connor became counsel for Mrs. Forrest with the understanding that his services were to be gratuitous, that the pieces of silver were not presented under the impression that his services were gratuitous, and that the large amount obtained for Mrs. Forrest was secured by "the perseverance and skilful management of Mr. O'Connor, and by procuring the reversal of judicial decisions, which, if they had been sustained, would have restricted her receipts to a much smaller sum." The report concluded by saying that "for these prolonged and successful services the committee consider him very moderately compensated," and they decided that there was no foundation for any of the charges against Mr. O'Connor.

During the period of his greatest activity, the slavery question was engaging the attention and agitating the minds of thoughtful men, and Mr. O'Connor was retained as counsel for two slave owners in suits to determine their rights to the recapture and possession of their alleged slaves.

The first case was that of Jack vs. Martin, a Negro,<sup>6</sup> which held that a citizen of Louisiana had the right, under the Constitution of the United States and the laws of Congress, to retake a slave who had escaped to the state of New York. This case was decided in 1835.

The second case was that of Lemmon vs. The People.<sup>7</sup> In November, 1852, Jonathan Lemmon and Juliet, his wife, residents of the state of Virginia, brought eight negro slaves into the harbor of New York on their way to Texas. The slaves were landed and taken to a boarding house, where they were discovered by a negro calling himself Louis Napoleon. He sued out a writ of *habeas corpus* from one of the judges of the Superior Court. On November 6th, the eight slaves were brought into court, and after hearing the arguments, the judge ordered the liberation of the slaves. Lemmon obtained a writ of *certiorari*, and the case was taken into the Supreme Court and argued in December, 1857, before the General Term, and the order of the lower court was affirmed. Lemmon thereupon appealed to the Court of Ap-

<sup>6</sup> 12 Wendell's Reports, 311; 14 Wendell's Reports, 507.

<sup>7</sup> 20 New York Reports, 562.

peals, where the case was argued in March, 1860. Mr. O'Connor meantime had been retained by the state of Virginia and filed a most elaborate and exhaustive brief, in which he quoted from the Bible and Shakespeare, and in his argument expressed his unqualified approval of slavery as an institution. He commented on the law of New York which enacted that no person "imported, introduced or brought into this state," shall be held in slavery, and contended that these words did not apply to the citizens of another state passing through or across this state. "I maintain," he said, "that that statute does not apply to the case of a southern owner *in transitu*, or temporarily sojourning here, but only to the inhabitants of our state, or persons dwelling within it." He referred with disapproval to Lord Mansfield's *dictum* that the common law of England did not recognize, and was fundamentally hostile to slavery, and said:

Now, so far as the fundamental law of England being opposed to slavery, white slavery formed an essential and integral portion of the common law, and that institution never was abolished by legislation. It merely ceased — when, why or how no man can tell, and no historian will venture to relate.

And again he said, indicating a strange animosity toward the negro:

Africa might well be looked upon, not as the true home of the negro, but only as the place of his production. That continent seems to have been, in reference to the negro, very much what the quarry is to the architect or the sculptor — a place whence to

draw a crude material, useless in its native state, but susceptible under wise control of being made useful to the human family.

Yet in the same argument he insists that there is such a thing as natural justice, ascertainable by the exercise of an honest and enlightened understanding, and as such, a law to the conscience of every man, and superior to all laws enacted by human authority.

What is contrary to conscience and contrary to that natural justice, with a knowledge whereof the great Father of us all has endowed every reasonable and intelligent member of our species, may not lawfully be practiced, however sanctioned by human institutions. I hold to that doctrine, and in that sense I do maintain that there is a higher law, and to that higher law — above and before all human laws — I vow undying allegiance.

He was of the opinion that negro slavery could not be abolished; that it had ever been a "main pillar of our strength and an indispensable element of our growth and prosperity." William M. Evarts was counsel for the respondents and made a strong and convincing argument in opposition to Mr. O'Connor. The Court of Appeals affirmed the judgment of the lower court.

It should be remembered that to defend and approve of slavery was, in those ante-bellum days, nothing abnormal, but the contrary; while the extreme demands and vehement appeals of the anti-slavery agitators offended and repelled many men of moderate and conservative views. It is remarkable, however, that Mr. O'Connor who hated injustice in every form and had no tolerance for privileges claimed,

or prerogatives demanded by a few favored ones at the expense or in contravention of the rights of the people generally, should have so enthusiastically defended slavery, and characterized it as "just, benign and beneficent." The colored man was removed beyond, or never came within the range of his generous and humane sentiments, and seemed to Mr. O'Connor an inferior being, to whom God and nature had denied distinctively human qualities, and so incapacitated for progress and enlightenment, except under the direction and subject to control of his superior, the white man.

One of the most important cases in which he was engaged is known as the Parish will case.<sup>8</sup> The documents, testimony and arguments in it fill eight volumes of his own *Cases*. Mr. Henry Parish, a retired merchant of New York, executed his last will and testament September 20th, 1842. In 1849 he was prostrated by an apoplectic stroke, and thereafter, and until his death in 1856, was a helpless invalid. During that period, three codicils to his will were executed, and it was the validity of these codicils, the second and third principally, that formed the subject of the controversy. Francis B. Cutting and William M. Evarts appeared for the proponents; Charles O'Connor, Ambrose L. Jordan and James T. Brady, for the brothers of the testator, who contested the will.

Mr. O'Connor exhibited in this case the highest

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<sup>8</sup> 25 New York Reports, 9.

ability as an examiner and cross-examiner of witnesses, and in the general conduct of the case. His argument before the surrogate was ingenious and convincing, prepared and delivered with the greatest skill and force, so powerful in its various parts and in its entirety as to be irresistible. The evidence as to the testator's capacity to make a will or a codicil after the apoplectic stroke in 1849 was, naturally enough, conflicting; but Mr. O'Connor succeeded in demonstrating, not only the absence of testamentary capacity, but that Mr. Parish was in fact in a state of idiotic dementia, without intellectual or volitional power; that the two or three codicils did not express his testamentary purpose; that they were, in fact, the work of his wife, drawn at her suggestion, by a lawyer of her selection, and executed at her instigation, the helpless and paralytic millionaire being merely a tool in her hands. No detail was omitted to strengthen his statement of the case, and his argument. He was especially determined to prove that after the apoplectic stroke in 1849, the testator's wife assumed entire control over her helpless husband, admitting to the house only such persons as were acceptable to her, taking possession of his income, investing his money in her name, and then causing the codicils to be executed that made her the residuary legatee of practically his whole estate to the disherison of his brothers and next-of-kin. The following extract from his argument shows what he regarded as the part played by Mrs. Parish in this drama:



Taking into view some facts already stated, we shall find the testator's wife secluding him from all intercourse with his brother, and expelling that brother from the house. We shall find her making numerous pitifully untrue representations against that brother, with a view to prejudice him in the eyes of strangers, not indeed to mislead her husband, for that was unnecessary — he was past all such misleading. We shall find her watching her husband's person day and night, never permitting any intercourse between him and others who might reveal the true condition of his mind. We shall find her interpreting according to her own purposes, his signs and gestures to selected persons chosen to have this nominal intercourse with him. We shall find her preparing such persons to play the humble part of dupes by appeals to their self-interest or their vanity, or by palpably untrue representations and impostures practised upon them. We shall find her desecrating to the purposes of fraud and deception, the sacred name and the sacred observances of religion — the holy cause of charity. We shall find her ensnaring her own highly respectable kinsmen in such a network, that they are at length constrained in desperation to become the instruments of her will, to forget, to prevaricate, to misrepresent. The learned and eminent counsel is drawn in by one artifice, the pious minister by another; the sexton falls by one piece of practice, the bank president and the president of the Bible Society by another; and finally, to fill up by direct and unmistakable untruth every remaining chink in the barricade behind which her plunder was to be intrenched, a desperate wanderer from truth and rectitude is obtained as a witness, and induced to out-Herod Herod.

Judge Selden of the Court of Appeals, in a dissenting opinion, said:

This is a most forcible and eloquent summary of the positions which it is incumbent upon the respondents to maintain in order to invalidate these codicils for the want of testamentary capacity . . . These positions are maintained by a vigor of logic, a

force of rhetoric, and a perfection of art which I cannot refrain from saying has, in my judgment, rarely been surpassed.

In the case of *Burrill vs. Boardman*,<sup>9</sup> better known as the Roosevelt Hospital case, Mr. O'Connor was counsel for the defendants, and succeeded in convincing the court that the disposition of the testator's residuary estate was valid.

Mr. Roosevelt, the testator, gave his residuary estate to nine trustees for the establishment of a hospital in the city of New York. He directed the trustees to apply to the legislature for an act incorporating the hospital within two years after his death, and within the lives of two living persons. In the event of the failure to secure such incorporation, the trustees were directed to pay the fund to the Government of the United States.

The court sustained Mr. O'Connor's contention that the will did not violate the statute against perpetuities, and that an executory bequest limited to the use of a corporation to be created within the period allowed for the vesting of the future estates and interests, was valid.

Mr. O'Connor was elected a member of the New York Constitutional convention of 1846. He was especially prominent in the debates on the proposed judicial amendment, and expressed himself as desirous of establishing "a judicial system by which equitable relief might be administered in the same courts

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<sup>9</sup> 43 New York Reports, 254.

in which legal relief was dispensed, without a separate court of chancery.”<sup>10</sup> He was of the opinion that “law and equity ought not to be known or recognized in our system of jurisprudence as distinct and separate methods of administering civil justice.” He desired “one uniform and harmonious system of pleading and practice.” He spoke of the common law forms of action as very technical, and of the pleadings as almost “invariably fictitious.” These pleadings were regarded as technically true by lawyers and judges, and the ignorance of juries in early times made it necessary to bring down questions to a “nice and simple point.” “These pleadings were modified from time to time until they had received the character that we now find impressed on them. They received their form at that period when a scholastic pedantry had overrun and perplexed with its arbitrary rules every branch of science.”

In his speech on the qualifications of the Executive, he pleaded for the rights of non-residents. “He was disposed to be radical in rooting out all antiquated evils and principles intended to create or perpetuate inequalities and disqualifications—whatever might tend to the erection of one class above another in the state. He would have a pure, perfect, representative Democracy where all men who had any share in the government should stand equal, and

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<sup>10</sup> Proceedings of the Convention.

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where the true principles of the revolution should be carried out to their fullest extent."

He was opposed to the section granting separate estates to married women. He also objected to any change in the number of the jury. Twelve men, he insisted, was the "ancient Saxon number, and this should always continue to be the number. No right should be given to the legislature to make it any less." He voted against the Constitution as a whole, and said, with reference to the judicial department, to which he had given most attention, that "he thought the convention had altogether failed to present to the people a constitution which would meet the exigencies of the times, or in any degree remedy the difficulties in this respect which led to the calling of the convention; that it did not in any moderate degree meet his approval, and was a most signal failure."

In 1877, in an address commemorative of the adoption of the first constitution of New York in 1777, he said:

It should not seem strange that the constitution of 1846, which gave life, vigor and permanency to the trade of politics, with all its attendant malpractice, was exceedingly acceptable to the managers of both the then existing political parties.

Mr. O'Connor had no approbation for David Dudley Field's scheme of codification; indeed, according to the testimony of Mr. Field himself, he

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<sup>11</sup> The Green Bag, vol. VII, 84.

opposed codification "with might and main."<sup>11</sup> Mr. Bigelow informs us that many years ago, when the subject of codification was being much discussed, Mr. O'Connor conferred with John C. Spencer and Benjamin F. Butler, both distinguished lawyers of New York, on the advisability of codifying the laws of the State, and then adds:

At a meeting of the three proposed codifiers, the subject was carefully canvassed, and they severally and collectively came to the conclusion that when they had done their best they would not be able conscientiously to recommend the result of their labors to the legislature for its adoption. The scheme was therefore very deliberately abandoned.

He had none of the spirit of an innovator or reformer of the law. With the exception of his advocacy of the union of the systems of common law and equity in one tribunal there is no evidence that he favored any law reform. His mind seemed instinctively to regard with respect and even reverence that which age and tradition had hallowed.

It is not improbable that he may at times have looked or hoped for political distinction, and possibly he might have been a figure of some importance in politics, had he so resolved, although it is hardly probable that he would ever have become a popular favorite. For a man of his independent and inflexible temper and high sense of personal dignity, to whom intrigue and indirection were naturally repugnant, the methods and machinations of politicians of the sordid sort could not but be especially

offensive, while submission to their dictates would have been absolutely impossible. Indeed, so intense was his aversion to professional politicians, that he might have used as his own these words of a great statesman of Irish birth: "In truth, the tribe of vulgar politicians are the lowest of our species. There is no trade so vile and mechanical as government in their hands. Virtue is not their habit. They are out of themselves in any course of conduct recommended only by conscience and glory."

In 1848 he was a candidate for the office of Lieutenant-Governor of New York, but was not elected. In 1853 he was appointed District Attorney of the United States for the Southern District of New York, but held the office only fifteen months.

In a legislative body he would have been ill at ease. Conformity to the rules and customs of the House of Representatives, for example, would have been irksome to him, and in its debates and deliberations he would not have been a very conspicuous figure.

Mr. O'Connor's advocacy of slavery had gained him many friends and a wide reputation in the south. He strongly disapproved of the employment of force to coerce the South, on the ground that the Constitution conferred no power to coerce seceding states, and was entirely out of sympathy with the North during the Civil War. At the conclusion of that struggle he became one of the counsel for Jefferson Davis, and, with Horace Greeley and others, was

one of the sureties on his bail bond. In recognition of his southern sympathies a section of the Democratic party known as the Straight-out Democrats, being unwilling to accept the candidacy of Horace Greeley, at Louisville, Kentucky, in 1872, nominated Mr. O'Connor for the presidency. In spite of his positive refusal to accept the nomination, his name was before the people at the general election of that year, and the O'Connor electors received about 29,000 votes.

Late in life he excogitated strange views looking to what he regarded as desirable reforms in politics. They do not require consideration here.

Of a lawyer whose knowledge of jurisprudence was so intimate and comprehensive, it is difficult to specify one department rather than another in which his proficiency most conspicuously displayed itself. He was victorious in the most celebrated divorce case, and in more than one of the most celebrated will cases of his time. There can be no doubt that in the law of wills, of uses and trusts, he was profoundly learned, and that in the conduct of suits to determine testamentary capacity, or the construction of wills, he was indisputably a master. That he was an expert in criminal law was demonstrated by his defence of young Walworth indicted for parricide.<sup>12</sup>

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<sup>12</sup> Mr. Charles W. Sloane, Mr. O'Connor's nephew, informs the writer that affection for Chancellor Walworth, whom he regarded as perhaps the most competent Judge before whom he ever appeared, induced Mr. O'Connor to exert every effort to save the great chancellor's grandson from the gallows.

That he was conversant with international law was shown in the case of the Brig of war General Armstrong, before the Court of Claims at Washington in 1855. His argument in this case is included in W. L. Snyder's Great Speeches by Great Lawyers, and is certainly a powerful presentation of the claim of the owners of the General Armstrong. It established, to the satisfaction of the court, the proposition that where "the claim of a citizen upon a foreign government has been submitted to arbitration, without his consent, or without an opportunity to be heard, and the award is adverse to him, the Government must respond to the claimant in damages."

He was counsel in the North American Trust and Banking Company's cases, the papers in which fill six volumes of his own *Cases*. With him were associated William Curtis Noyes, William Kent, and Benjamin F. Butler of New York. Opposed to him were Nicholas Hill, Samuel Beardsley and Greene C. Bronson. These cases under the title of Curtis and others against Leavitt settled certain important questions of commercial and corporation law, and are reported in the fifteenth volume of the New York Court of Appeals Reports, and take up 286 pages of that volume.

In one of his notes Mr. O'Connor says: "The great law questions on which these cases turned were, I may safely say, argued by myself exclusively. This was understood and acknowledged by everyone concerned." He also quotes a remark of Nicholas



Hill's to the effect that "the men who had participated in the controversy, or in early life witnessed parts of its progress, would remember and speak of it with interest for half a century."

In the conduct of the New Almaden case, which fills eight volumes of his *Cases*, he was obliged to acquaint himself with the law of foreign jurisdictions, to read documents in the Spanish language, and out of an intricate congeries of confusions and contradictions, to bring some semblance of order and verisimilitude. The record of this remarkable suit is contained in the 2d volume of Black's United States Reports under the title: United States vs. Castellero, and occupies more than 350 pages in that volume. Reverdy Johnson was associated with Mr. O'Connor on behalf of the claimant at the final hearing before the Supreme Court of the United States. Jeremiah S. Black and Benjamin R. Curtis represented the United States. The title to a quick-silver mine and land in Santa Clara County, California, was the subject of the litigation. "In the bulk of the record, and the magnitude of the interests at stake," said the counsel for the Government, "this is probably the heaviest case ever heard before a judicial tribunal."

In 1875 Mr. O'Connor published anonymously a volume entitled "Peculation triumphant: Being the record of a four years' campaign against official malversation in the city of New York, A. D. 1871 to 1875." It contained briefs of the counsel in suits brought in the name of the People of the State

against certain of the conspirators of the so-called Tweed ring, with notes and statements by Mr. O'Connor, together with judicial opinions.

It seems that Mr. O'Connor was induced, largely by the persuasion of Mr. Tilden, to engage in the prosecution of suits against Tweed and his co-conspirators, at an age when he might have pleaded immunity from such controversies, and insisted upon the duty of younger men to undertake the work. To quote Mr. Tilden,

Mr. O'Connor was, nevertheless, in complete sympathy with the right. I had often communed with him over evils which there seemed to be at the time no means to redress. I went out to Washington Heights to see him; I told him the hour had come. He said he would help, according to his view of what he was best adapted to and of what was most fit for him to undertake.

His abhorrence of dishonesty in public officials, no doubt, made it easy to enlist his sympathies and engage his services in actions against the "trading politicians," who, to use his own words, "had discovered that the city of New York might be made the Golconda of fraudulent cupidity."

In October 1871 a branch of the Attorney-General's office was established in New York under the management of Charles O'Connor, Wheeler H. Peckham, William M. Evarts and James Emott. Criminal proceedings against Tweed and his co-conspirators, as Mr. O'Connor informs us, were deemed inadvisable on account of their strictly local character, and the "palpable servility of the local judiciary."

Mr. O'Connor himself favored a civil action in the name of the people of the state, and thereupon such an action was begun. The defendants demurred to the complaint, and maintained that the state had no right to sue, but that the County of New York was the proper plaintiff. The Special Term sustained the demurrer; the General Term affirmed the decision of the Special Term, and the case was appealed to the Court of Appeals and argued there June 3d, 1873, reargued February 11th, 1874, and decided June 9th, 1874, in favor of the defendants. Mr. O'Connor was senior counsel for the people, Messrs. Tilden and Peckham being associated with him, while David Dudley Field, William Fullerton and Elihu Root appeared for the respondents.<sup>13</sup>

The brief of Mr. O'Connor sustaining the position that the state was properly made the plaintiff rather than the county, was of course elaborate and exhaustive. The court, however, was not convinced, either by the brief or the argument, and by a vote of five to two, decided that the demurrer should be sustained.

Mr. O'Connor was much disappointed and incensed at this decision of the Court of Appeals, and permitted himself to criticize and rebuke the judges for taking the view which he had antagonized.

Again, when the Court of Appeals in the suit of the People *ex rel.* Tweed vs. Liscomb,<sup>14</sup> held that the cumulative sentence that Judge Noah Davis had im-

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<sup>13</sup> People vs. Ingersoll, 58 New York Reports, 1.

<sup>14</sup> 60 New York Reports, 559.

posed upon Tweed was illegal, and that the sentence should not have exceeded the maximum prescribed for one offense, Mr. O'Connor again criticized and rebuked the court with considerable asperity.

In 1875 the Legislature passed a law drafted by Mr. O'Connor, authorizing the People of the State to commence and prosecute suits for the recovery of public moneys and property belonging to any division or subdivision of the state.

In 1877, at the age of seventy-three, he journeyed to Washington to appear before the Electoral Commission on behalf of the Tilden Electors in the Florida case; and on February 5th, made his argument. Jeremiah S. Black and Richard T. Merrick were associated with him.

As Mr. O'Connor's standard of professional honor and deportment was the very highest, it is easy to surmise what would be his opinion of the methods and practices of attorneys who are described in the familiar jargon of the day as "hustlers;" or of those who become the adroit instruments and agents (albeit designated "counsel") of powerful corporations to enable them to effect their purposes regardless of law, and in defiance of courts, and to conduct their business, not primarily for the benefit of the public and those entitled to their care, but for the personal profit and advantage of a few officers intrusted with the management of their affairs. To figure in such capacity, thus to employ his talents and his learning, would have seemed to Charles O'Connor unworthy of

a lawyer of high character and independent spirit—nay, utterly offensive and impossible.

It is interesting, but not surprising, to learn that Mr. O'Connor in his charges for professional services, always observed moderation. He never was unduly acquisitive, nor allowed the love of money for its own sake, to obtain a dominating influence over him; on the contrary, he subordinated money-making to a higher purpose. It is related that once, when a client offered, and with some insistence urged him to accept a very much larger fee than he had intended to charge, he became exceedingly indignant, and intimated in his own forcible way that he would allow no one to dictate to him as to what his charges for professional services should be; and dismissed the presumptuous client without ceremony.<sup>15</sup>

His main purpose, it seems, was to attain to the highest eminence in his profession, and to prove that the son of a foreigner, without social position, could equal and surpass the men who had all the derived and factitious advantages denied to him.

The arduous struggles of his youth, the long apprenticeship, the uninterrupted and exhausting labors, the unchanging devotion to the practice of the profession, at length undermined his health, and his physical disorder aggravated his propensity to sarcastic and splenetic speech. He was conscious of

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<sup>15</sup> Told by Mr. William H. Winters, who as Librarian of the New York Law Institute, enjoyed an intimate acquaintance with Mr. O'Connor.

sterner conflicts and greater diligence than other men; he was convinced that he possessed a more thorough knowledge of the law. Hence he did not always exercise restraint in criticizing his contemporaries whether on the bench or at the bar. There was an acrimony in his strictures that no doubt stung; but underneath, except in a few instances, there was no malevolence. On the other hand, he could and did express high appreciation of the character, talents and position of certain of his contemporaries.

The Celtic qualities in his composition did not manifest themselves very noticeably in his arguments or public addresses. There are extant statements to the effect that he was not entirely destitute of sentiment or deficient in taste. But the course of his life, his labors and studies had tended in the other direction. His mind, whatever it had been naturally, had become severely practical. Emotion no doubt there was, but it was almost completely subordinated and held in check. Indeed, he maintained a stern control over all his faculties and kept them operating as he determined by his own powerful will.

At any rate, as we have said, in his forensic addresses there is nothing introduced merely for ornament, to produce a sensation, to heighten the effect. *Quid est enim tam furiosum, quam verborum vel optimorum atque ornatissimorum sonitus inanis, nulla subjecta sententia nec scientia?* Of course, in most of his cases there was no occasion for rhetorical

display. His arguments were necessarily legal and logical, and nothing else. Law and legal modes of thinking had become so inwrought into the texture of his mind, that from long habitude, all other ways of looking at things were rendered difficult, if not impossible. It may be doubted whether he was capable of expressing himself in a highly ornate and rhetorical style like that of Burke, for example, whose resplendent oratory was the natural expression of an opulent imagination and a fervid soul.

Mr. O'Connor can hardly be regarded as a popular speaker. The printed copies of his addresses to promiscuous assemblies do not leave the impression of a man born to be an orator in the highest sense of the word. Like the Athenian Phocion, he was indifferent alike to the applause and disapproval of the multitude. It was his business to convince courts and persuade juries by cold inexorable logic, to enforce his views by irrefragable reasoning.

If Mr. O'Connor did not exemplify Cicero's conception of the complete orator with his varied accomplishments and all-inclusive culture, he certainly is an illustration of the Ciceronian description of the thoroughly trained lawyer or jurisconsult: *Sin autem quæreretur, quisnam jurisconsultus vere nominaretur, eum dicerem, qui legum et consuetudinis ejus, qua privati in civitate uterentur, et ad respondendum et ad agendum et ad cavendum peritus esset.*<sup>16</sup>

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<sup>16</sup> De Oratore, I, XLVIII.

The imagination in him seems to have had little or no nurture, no opportunity for development. As a young man he preferred reading Comyn's Digest, and for aught we know, Fearne on Contingent Remainders, to literature of the purely imaginative variety. It was hardly possible for him in the laborious youthful years, devoted as they were to the "authoritative writings of the venerable sages of the law," to spend much time with the poets and romancers. Singularly enough, by the testimony of two friends, late in life when he had larger leisure, Milton was his favorite poet, Milton, the great poet of Puritanism and the grand style. Perhaps it was the profound seriousness of Milton's nature, his sense of personal dignity and honor, that comported with the gravity and austerity of mind that characterized O'Connor, and commended the Puritan to the Catholic.

Toward purely speculative thinking there was no proclivity. His mind, on the contrary, was mainly of the analytical, or dialectical order, and exercised itself most readily and experienced its highest satisfaction in the solution of complicated and abstruse legal problems.

Whether Mr. O'Connor's distinction as a jurist and his usefulness as a public character might not have been increased had he received a classical or a university education, and throughout his career given more time to general culture, is a question that may not unnaturally be asked. It is safe to say, however,



that such an education and pursuit of culture would not have enlarged or multiplied his qualifications simply and solely as a lawyer. A deeper knowledge of history, literature and philosophy, which by some authorities has been deemed prerequisite and even indispensable to the equipment of the truly great lawyer and jurist, would not have increased his ability to conduct trials and win cases. But such studies, while they might not have strengthened, would have liberalized his understanding and extended his intellectual horizon. They would have opened to him domains of opulence and beauty into which he was destined never to enter. He might have found more genuine satisfaction in his leisure hours, more refreshment and consolation, had he been able in the decline of life to renew an acquaintance with the master spirits of literature and philosophy.

Mr. O'Connor's greatness as a lawyer impressed those who are themselves regarded as great lawyers. Contemporaries of his, men who were opposed to him in litigation, men who were acquainted with his skill as a draughtsman and pleader, and with his argumentative abilities, have testified to his greatness. John K. Porter, for example, regarded Alexander Hamilton, Nicholas Hill and Charles O'Connor as the greatest lawyers, not only at the bar of New York, but of the United States. William M. Evarts said that Mr. O'Connor, in his judgment, "was the most accomplished lawyer, in the learning of the profession, of our bar," and "that he was entitled to

preëminence in this province of learning among his contemporaries in this country, and among the most learned of the lawyers of any country, under our system of jurisprudence."

There can be little or no difference of opinion as to what constitutes the true greatness of a lawyer. Profound erudition, consummate ability to influence courts, persuade juries, examine and cross-examine witnesses, to make the clearest and most convincing presentation of a case; the power to achieve victory by the exercise of high intellectual force and irresistible volitional energy and courage; to detect and employ every legitimate device and instrumentality to render a position impregnable, and with unfailing tact to take a fair advantage of every weak point in the opponent's case, of every lapse, every false step, every neglected opportunity—all these characteristics and capabilities may be considered necessary to the equipment of the lawyer who would be numbered among the preëminent leaders of the bar.

To make the winning of cases subordinate to the prevention of unwise and unnecessary litigation, to seek to simplify the practice, thereby reducing the expenses and burdens of litigants, to set an example of unselfishness and moderation, to be willing to neglect petty technicalities and to reject opportunities of personal advantage when substantial justice may be attained, without them; to demonstrate in all transactions, whether with clients or opposing counsel, candor, amenity, a fine and delicate sense of

honor, a scorn of covetousness and mere pecuniary profit for its own sake, to regard the honor of the profession and the public benefit as incomparably more important than private gain or personal success—all these may also be considered as indispensable elements in the description of the truly great lawyer.

If this is not a wholly accurate presentment of Mr. O'Connor's character as a lawyer, it approximates it very closely, and it is hardly necessary to repeat that he possessed those qualities and characteristics everywhere and at all times recognized as generally prerequisite to the attainment of the highest distinction. While other lawyers have been favored with more brilliant natural gifts and endowments, with greater versatility and the ability to excel in more than one department of human activity, with intellectual powers of greater amplitude; few, we think, if any, have surpassed him in the capacity for the mastery of legal principles and their application to specific cases; in the clear and complete apprehension of all the facts; in the determination by sustained and indefatigable study to acquaint himself, with the utmost thoroughness, with every detail and circumstance, the knowledge of which might be deemed essential to the successful conduct of a case; in that complete preparedness to which no development of the trial, no move, no change of tactics on the part of opposing counsel could come as a surprise, or operate to the disadvantage of his own

client. In addition to this high, this consummate professional competence, he possessed that alertness, that zeal, that inexpugnable resolution to overcome opposition, which induced clients to repose in him an absolute trust.

As it was his rule not to undertake the conduct of a case unless he had assured himself with a reasonable degree of certainty that the law was on the side of his client, the probability of defeat seemed to be reduced to a minimum; and the fact is, that the number of cases in which the final decision was against his clients was remarkably small.

Among his contemporaries at the bar, John Anthon, Ogden Hoffman, David B. Ogden, Francis B. Cutting, George Wood, Nicholas Hill, John Van Buren, Daniel Lord, William Curtis Noyes, James T. Brady, David Dudley Field, William M. Evarts, at one time or another ranked as leaders of the bar of New York, and against each of them he contended in litigation, either at *nisi prius* or before the Court of Appeals. Whatever may have been the individual capabilities and attainments of these eminent men, and they were abundantly recognized during their lives, the fame of Charles O'Connor, simply as a lawyer, surpasses theirs and rests upon a more enduring foundation.

Mr. O'Connor was a tall, spare, impressive figure, with a well-shaped head, a face pallid from excessive study, keen penetrating eyes, glowing with the light of a powerful unresting intellect; a somewhat harsh

voice suggesting acerbity of temper; not a man to invite acquaintance or tolerate familiarity; a self-contained, austere man, a man of will, stern, inflexible, unconquerable; a man born to hew his own way to eminence, to command recognition and to dominate men by innate and irresistible force of character.

Yet beneath this somewhat repellant exterior there was a warm human heart easily touched by the sorrows of the poor and the unfortunate, a genuine fund of kindness and sympathy that responded promptly to the appeals of indigence and weakness.

Mr. O'Connor never cared very much for what is called society. In the early years social diversions were out of the question. After his marriage in 1854 he occasionally entertained his friends at his home at Fort Washington, and went about a little in the social world. At one time he was a member of an association of about forty lawyers, called the Kent Club, the meetings of which for purposes of discussion and relaxation, were held at the houses of the members. Although he had a keen appreciation of genuine wit, and was quite capable of jocularities, he was not a ready or brilliant conversationalist. He was in no sense a club man. He interested himself in the New York Historical Society, and became one of its vice-presidents. He was treasurer of the New York Law Institute for a series of years, and in 1869, was elected its president. He frequently visited its rooms, and spent many laborious hours in its library.

Union College gave him the degree of Doctor of Laws in 1865. Columbia College conferred it upon him in 1872; Dartmouth College, and Washington and Lee University in 1875; Harvard in 1882.

It is hardly necessary to say that Mr. O'Connor's private life was irreproachable; that he was faithful in little things as in great; generous with his money and loyal to his friends; that he was a living exemplar of the virtues of order, temperance, justice, gratitude.

As he advanced in years and the period of old age came on, he gradually withdrew from active practice and appeared less frequently in the courts. There was, however, no abatement of interest in the profession, nor in legal questions and controversies. Like a venerable jurisconsult, he was much resorted to by his younger brethren of the bar for advice and formal opinions.

On the fly leaf of the first volume of his *Opinions*, he has quoted from Sir Samuel Romilly's diary, a passage expressing that eminent lawyer's objection to writing opinions, and giving as his reasons the uncertainty of the law and the fact that the decision depends upon "the particular mode of thinking of the judge before whom the question may happen to be brought." To this O'Connor added in 1874, by way of comment: "Romilly did not love his profession. Examining stated cases and giving written opinions upon them has always been to me a very agreeable employment."

Toward the end of his life, after a severe and protracted illness, having decided that his health would be benefited by a moderate maritime climate, he built a house on the island of Nantucket, transported thither his large library, and there passed the few remaining years in studious retirement, interrupted only by visitors or by an occasional trip to New York or Washington. There is no evidence that he was especially fond of nature, but we may believe that he found some satisfaction and pleasure in walking along the shore of the sea, and meditating upon his professional career, that had been so long, so contentious and so honorable.

He died at Nantucket, May 12th, 1884.<sup>17</sup>

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<sup>17</sup> To the Executive Committee of the New York Law Institute, the writer makes his grateful acknowledgments for the privilege of consulting the Cases and Opinions of Charles O'Connor, and to its librarian, Mr. William H. Winters, for helpful suggestions and information,—without which privilege and Mr. Winter's assistance it would have been impossible to write this essay.

DAVID DUDLEY FIELD.





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From a painting by Robert Gordon Hardie.







# DAVID DUDLEY FIELD.

1805-1894.

BY

HELEN K. HOY,

*of the New York Bar.*

IT has long been the fashion to decry the bar of the day and to cite from the past illustrious examples to shame the advocates and practitioners of the present; for to deplore the degeneracy of one's own time is a natural and universal custom, which no people, class or age fails to follow. Even the great Chancellor Kent pessimistically reviewed his own generation. In mournful retrospection to the early days of the century, he admiringly paid tribute to Alexander Hamilton, who as lawyer "*omnes longo post se intervallo relinquerit*," and regretfully dwelt upon the tendency of the times to disenchant the legal profession of much of its attraction.

Yet at that very date De Tocqueville in his great work upon the United States was commenting on the exceptional position held by the bar in America and was concluding that the profession in this country constituted an aristocracy in the true Greek sense. And this conclusion based upon the services and

achievements of the bar up to 1835 continued justified, for there was even then coming into conspicuous view a group of lawyers than whom the history of a hundred years offers no practitioners more learned, no servants more zealous or disinterested. Cutting, with his splendid presence and perfect mastery of the commercial law; George Wood, great expounder of all the learning relating to real property and trusts; Fullerton, peerless examiner and cross-examiner; the elder Choate, whom no jury could resist, these with Noyes, Beach, Butler, Gerard, made up a splendid galaxy whose brilliancy was enhanced by the flashing genius of Brady, the intense, fiery eloquence of Evarts, O'Connor of heroic mold, Carter, pitiless logician, and David Dudley Field, aggressive, impressive, relentless, like the Horatian Achilles:

*"Impiger, iracundus, inexorabilis, acer."*

Of all these men, who are to-day known even to the profession? To which of them has living fame come solely because they were lawyers of consummate skill? They were giants in their generation. They influenced juries and, inducing some decisions and preventing others, they in large measure determined the development of the law. Yet because impressions upon juries are of only immediate purpose and because the declaration of the law passes for the work of the judges, the lawyer's fame is as evanescent as the speech that makes it. Evarts' pro-

fessional connection with the impeachment of Andrew Johnson and with the Hayes-Tilden controversy is remembered not so much because as a lawyer Evarts had a large part in directing the issues in those matters as because the events themselves made history. Hamilton's fame is associated in the public mind less with his purely legal attainments than with the preëminence of his statesmanship. To achieve the enduring reputation, even the most successful practitioner must, forsooth, forsake the jealous mistress and engage in other labors, the nation's problems of affairs of state.

It is the distinction of David Dudley Field as of no other American lawyer that he found a path to lasting usefulness and eminence within the law. In the midst of the arduous duties of the largest practice at the New York bar, in the midst of political contests in which he was so active as to be a leader in the councils of his party, in the midst of bitter antagonisms into which he to a degree beyond most practitioners was drawn, he cherished and fulfilled an ambition that was not extra-professional because it was a discharge of that duty which according to Bacon every man owes to his profession. For half a century as great labors as most men devote, or as he himself devoted to personal advancement, Field gave to the furtherance of a public cause for which he neither received nor could expect any recompense other than the consciousness of having performed a public service and of the public's having



recognized that service. For fifty years Field toiled unremittingly to improve the condition of the law itself and the procedure by which it is applied to men's controversies. And although he went without accomplishing both of these reforms, those who during his lifetime had assailed him most often and bitterly, ungrudgingly declared upon his death:

✓ The magnitude of the results of his labors can scarcely be overestimated. It might not be universally conceded that he was the greatest of contemporary advocates or even jurists; but that he exerted a greater influence in modifying and simplifying the judicial systems of the United States and England than any other man of his time, will hardly be denied. The world over, wherever the prevailing jurisprudence has had its origin in the English common law, the form and manner of conducting litigations and transacting the business of the courts are due to the influence of David Dudley Field.

In a republic where the aristocracy of achievement is regarded as ranking the pretensions of wealth and family, lineage is certainly not overvalued. When, however, there are born into one family four brothers of the exceptional endowment and caliber of David Dudley, Stephen J., Cyrus W., and Henry M. Field, there seem to be conspicuous reinforcement and illustration of what Dr. Holmes has termed the dynamic force of New England's Brahmin blood, and unusual interest attaches to the stock from which they sprang.

The mother of the famous brothers was Submit, daughter of Noah Dickinson, a captain under Gen-

eral Putnam in the French and Indian War and a fighter in the Revolution also. The father was David Dudley Field, son of Captain Timothy Field of the Seventh Regiment of Connecticut, which fought under Washington. Intellectual training was the portion of the father only, who was educated at Yale College under the noble influence of President Dwight. Throughout his course he roomed with Jeremiah Evarts, the father of William, and was associated with classmates nearly all of whom were distinguished in later life. Field chose the ministry for his profession and after studying theology with Dr. Charles Backus, of Somers, where he found his bride, settled in a humble parish at Had-dam, Connecticut. There in the plain two-story frame parsonage that stood so close upon the street as to leave but few feet for a bit of grass, on the 13th day of February, 1805, was welcomed the first-born son, to whom the father's name was given, David Dudley Field.

Born of this clerical and military stock, the boy showed a loving and determined spirit from early childhood. His father was his first teacher and vigorous and thorough were the drill and discipline which he received in the pastor's study. With a passion for poetry and nature fed by Milton and the rugged beauty of the straggling quarry town on the Housatonic, with his powers of observation and reasoning awake and fast developing, Field made a promising pupil in 1819, when upon his father's

removal to Stockbridge, Massachusetts, he entered the academy of the well-known teacher, Jared Curtis. Here were studying Mark and Albert Hopkins, later to be the President of Williams College and its Professor of Astronomy, and a third boy, John Morgan, who became a professor at Oberlin. With these youths Field formed one of the most intimate friendships of his life, and with them in 1821 went to Williams College. He won recognition and took high rank but left the college a year before the graduation of his class in 1825. Whether he was expelled does not appear, but he was believed to have given some offense to the President, Dr. Griffin. Whatever the cause, the irritation must have been removed, for Williams later regarded Field as one of her dearest sons, conferring the Master's degree upon him and subsequently honoring him as President of the Alumni Association.

With college behind him Field turned to the law, whither his habit of questioning, his ardor in debate and his combativeness naturally led him, and through a Stockbridge friend, Theodore Sedgwick, he was enabled to begin his studies in the office of Sedgwick's former partner, Harmanus Bleecker, of Albany. With ten dollars and a Bible as his only capital the young man first set his face toward the city where not long afterward he was to be a central figure and where to-day in the Court of Appeals his portrait hangs among the distinguished of the state.

But Field was not long in Albany. He left

Bleecker to be with the Sedgwick brothers, Henry and Robert, in New York. In their office he applied himself diligently with the result that soon after his admission to the bar as an attorney in 1828 he was taken into partnership. In 1830 he was made a counselor as the custom then was, and, Henry Sedgwick having been forced by illness to retire, Field at the age of twenty-five found himself in the full tide of an established practice which for more than fifty years scarcely slackened.

The next half dozen years were years of establishment; busy ones in which the young lawyer prepared thoroughly his cases and acquired a wide range of experience, yet reserved leisure for study and contemplation, especially of the procedure of practice in relation to the law itself. They were pleasant years, too. Field was contented in his professional associations; at his boarding-place, 80 Canal Street, he delighted in the companionship of William Cullen Bryant, who was just then abandoning the profession of the law for the more congenial field of literary occupation; and from 1829 to 1836 his cup of joy was full, for the happiness of his youth was crowned by his marriage to Jane Lucinda Hopkins, a cousin of his college chum, Mark Hopkins, and by the birth of his two children, David Dudley and Jeanie Lucinda. In 1836 his wife died.

Sick at heart Field made his first trip to Europe to dull his grief. For fourteen months he traveled in England and throughout the Continent, finding

relief in the change of scenes and compelling interest in all that he saw. He studied the languages, laid the foundation of his future wide acquaintance with foreign persons and places, and observed customs and manners, especially comparing legal systems and their operation.

When he returned home, it was to no inactive life. Nature's partiality to her children does not often go so far as to bestow genius and industry upon the same person, but if there be any to dispute Field's genius there can be none to deny his industry. It was unflagging, indefatigable. Yet the mountains of work which he accomplished were no more remarkable than the diversity of interests in which he engaged. He resumed a practice which increased to be the largest in the city. With public questions he so concerned himself as to become a factor in the higher politics. Withal he consecrated hours to his lifelong struggle to reform the law.

From now on for a third of a century Field was the most commanding figure at the American bar. "Tall, erect, stalwart, alert and decided in movement, courteous and graceful in bearing, he impressed the observer at once as a man of marked gifts and force. Those who knew him intimately saw a man of strong feelings and passions, an imperious nature equipped with great intellectual power and restrained by an intuitive appreciation of the amenities of social life."

His professional manner was easy but distant.

In some moods there were suggestions of Bismarck. Many spoke of him as a man of iron, cold, stern, severe. Yet in a great cause his pleadings were instinct with a warm personality. Often eloquent, his arguments were always vigorous and characterized by a sheer earnestness of tremendous moral force. "There have been other lawyers," Austin Abbott said, "with more notable gifts of wit, humor, satire, and invective, but few if any ever delivered harder blows or sharper thrusts yet with so much respect for forensic and parliamentary proprieties."

A breaker of precedents rather than a respecter of them, Field liked nothing better than to establish sound principle against apparent authority, or to argue before an unfriendly court and extract a favorable decision from an unwilling judge. His confidence in his views of the law was large. Indeed one element of his power was his belief in himself. Another was his exhaustive research into the law that bore upon his case. His preparation was as piercing and thorough as that of Charles O'Connor, who said of his own efforts in a certain case, "I have not left unturned a stone under which there crept a living thing." In the conduct of a trial, Field's acuteness was unexcelled. Any person who ever heard him try a cause in court is well aware how exactly he knew and remembered the slightest particulars of the least important testimony connected with his case, how his unceasing watchfulness never lost a single point of fact or law. Equally profound were his

knowledge of legal principles and his grasp of the most intricate technicalities of procedure, the latter often enabling him to take an opponent at a disadvantage. Once in a heated controversy an irritated adversary called Field "the king of pettifoggers," a title which though intended to belittle yet indicated Field's mastery of the legal weapons at his command.

The number of litigations in which Field was retained during sixty years of activity was of course beyond counting. A collection now in the New York State Library, fifty volumes of "Cases and Points" containing his briefs and records bound together in order of time and a dozen scrap-books of newspaper clippings relating to his chief causes, gives an idea of the character and size of his practice, of which even a cursory review is here impossible. His connection with certain most notable cases, however, is history.

After the war, Field, with his clear, firm views of law and political rights, could not but feel the strongest repugnance to the continuance of military domination, and he set himself against the carpet-bagger in the South and Federal usurpation in the North. In a series of cases arising during the difficult period of Reconstruction and involving grave constitutional questions, Field made perhaps his most noted arguments, models of learning and forceful proof. In the Mulligan case he argued against military tribunals for civilians and established the unconstitutionality of suspension of the writ of *habeas corpus*

after the close of the war or in territory neither the theater of war nor under martial law. In the Cummings and Garland cases he made Test oaths odious and won the decision which rendered it unconstitutional for a lawyer or a clergyman to be deprived of the right to practice his profession because he would not or could not swear that he had taken no part in the Rebellion, or had no sympathy with it. In the memorable McArdle case which involved the Reconstruction Acts of Congress, Field argued the unconstitutionality of military government of a state and his contention was sustained by Congress itself, for the court deferred its decision, perhaps that Congress might be spared the humiliation of having its acts declared void, and that body hastened to repeal the measure in which it had assumed an authority which it did not possess. The famous Cruikshank case, growing out of the Enforcement Act, Field argued in 1875, when he was past the Biblical limit of age, and his exposition of the true constitutional theory of state rights would have done credit to a constitutional lawyer in his prime.

In many other causes, of less importance perhaps but nevertheless of wide interest, Field displayed the same large ability with equal success. But in certain conspicuous instances the success won was unfortunately almost generally regarded as without honor. This unfavorable public judgment, in truth a grave charge against his integrity, was the result of his professional connection with "Jim" Fisk and



Jay Gould in the famous—or infamous—Erie litigations. When Fisk and Gould formed their notorious partnership to get control of the Erie railroad, they made an alliance with that incarnation of political immorality, William Marcy Tweed, which was equivalent to investing them with the highest attributes of sovereignty, for it enabled them through an unparalleled system of bribery and corruption to control not only city, state and federal officials, but the legislature and even judges. Requiring the ablest legal advice in the execution of their plans, it was not strange that they should have sought to retain a man so able and astute as Field, but that Field should have lent his learning to such prostitution of the law as the successive *coups* of the unscrupulous intriguers seemed to involve, shook the public's faith in his probity. Mercilessly he was arraigned by professional as well as popular opinion. For months the press devoted not only columns but pages to the Erie litigation and attacks upon Field's part in them. Field protested vigorously against the public judgment of him, insisting on the lawyer's duty to defend and protect to the utmost the rights and interests of his clients, regardless of consequences to himself, but in the words of the Tribune: "The shame of the New York bar in common estimation was not that eminent lawyers were willing to appear for a roué and a swindler, or to defend a band of conspirators accused of robbery and breach of trust; the charge against Field was that he had made himself the agent

of defending fraud and outrage by illegitimate means, distorting the processes of the law, and turning the courts to infamy. The scandal of the Erie was not so much the injustice of the cause as the dishonest arts by which it was believed the cause had been supported." To such charges, elaborately made, Field made equally elaborate replies and in some points even his accusers admitted him to be less culpable than had at first been thought. The public, however, was never thoroughly convinced that he was not responsible for certain proceedings which it could not condone.

Largely because of the Erie strictures Field was further criticized for his connection with "Bill" Tweed. In this case the public showed less discrimination and censured Field not so much for his method of procedure as for his acceptance of Tweed as a client. The relationship had come about in a way which should here be recalled. When the master thief of Tammany Hall was at last to be prosecuted by an aroused community, Field, refusing an enormous retainer, declined to defend the imperiled boss and at the request of the Committee of Seventy, which was conducting the investigation of the Tweed ring, gave that organization his services, stipulating that he should receive no fee. He had prepared his plan of prosecution when some of the committee expressed a feeling that they could get along without him. Thereupon, almost it would seem in a spirit of bravado, he reconsidered Tweed's offer and be-

came his counsel, in the four years' fight that followed defeating at almost every turn the brilliant Charles O'Connor, who had been appointed special prosecutor. Again Field disregarded all personal considerations, and despite the odium attaching to his client fought loyally every step of the hard way to a Court of Appeals, reversal of the cumulative sentence pronounced by Judge Noah Davis and to Tweed's release from prison upon a technicality.

This episode added to Field's unpopularity and although the investigation of his conduct in the Erie suits which Field had requested of the Bar Association had been dropped after a hearing of Field and the incident considered professionally closed, he received from these connections, if he did not earn, a measure of rebuke which notwithstanding all his apparent proud indifference wounded his sensitive if imperious nature and clouded his career at least temporarily. For, while a smaller man's reputation would have been blasted by the Erie scandal, Field was too big in his profession, too spontaneous, constant and disinterested in his civic service to be distrusted always. The shield might show tarnish but it was not therefore to be hung up to rust. Wherefore Field continued active in his recognized high position at the bar and in the nation. Indeed it was after this blighting season that he was elected to Congress to fill the unexpired term of Representative Smith Ely, who had been chosen mayor of New York.

This was at the time of the Hayes-Tilden controversy when the dispute over the Louisiana, South Carolina, and Florida election returns was deadlocking the Republican Senate and the Democratic House. Field had voted for Hayes but was convinced of Tilden's election and so eager to see justice done that he was glad to be sent to Washington, where it was felt his legal knowledge and ability would be of the greatest assistance to Tilden's cause. At the instance of Tilden's supporters, therefore, he was nominated and elected. He was seated in January, 1877, and during his two months of office was a conspicuous figure in the House, serving on the most important committees, doing merciless work in the examination of the Louisiana and Florida returning boards, and giving advice on the legal and constitutional questions that arose. He drew the objections to the counting of the votes of Louisiana and Florida, the bill providing for the administration of the Presidency in case of a failure to elect, and a bill providing for *quo warranto* proceedings. This the Democratic caucus voted to bring in but when Field brought it in the bill was not passed. Field was bitterly disappointed in what he considered his own party's failure in this particular, for he was confident that could the case once have been brought before the courts, Tilden's title would speedily have been established.

Aside from the merely nominal office of Code Commissioner, this was the only public position Field

ever held. Only once had he been an office seeker, in 1837, when he sought election to the New York legislature in order to advance his codification plans but was defeated through the opposition of Bishop Hughes on an educational issue. Once an appointment to the bench of the New York Supreme Court was offered him but he declined it, feeling that his place was rather at the bar. Yet Field, though essentially not a politician in the abused sense of that word, was always intensely interested in public affairs and despite his absorption in practice and legal reforms was active and influential in state and national life for fifty years.

Although born and educated in an atmosphere surcharged with Federalism and all that was anti-democratic, Field believed in the principles of Democracy and his first speech was made in Tammany Hall, in 1842, when Robert H. Morris was nominated for the Mayoralty. Field was of the rare anti-slavery type, however, and though always loyal to the party's principles would not be in bondage to its name. Hence the moment he saw that the party was to be used as a means of extending slavery, he spurned its authority and was one of those who led the way to the Free Soil Party. In 1844 at the great demonstration in the Broadway Tabernacle, Field spoke with vehement eloquence against Tyler's treaty and the annexation of Texas. In 1846 when the Wilmot Proviso was the battle cry of the north, Field wrote the famous "Secret Circular" and "Joint

Letter," designed to rally the anti-slavery portion of the Democratic party. In 1847 he was a delegate to the Syracuse Democratic Convention into which he cast his famous "fire-brand-of-freedom" resolution afterward called "The Corner Stone" and long printed in the Barnburners' newspapers as the cry of the Free Soil Party. It was in the following words:

Resolved: That while the Democracy of New York, represented in this convention, will faithfully adhere to all the compromises of the Constitution, and maintain all the reserved rights of the States, they declare, since the crisis has arrived when that question must be met, their uncompromising hostility to the extension of slavery into territory now free, or which may be hereafter acquired by any action of the Government of the United States.

With the nomination of General Cass in 1848, a crisis was reached in the Democratic party. In the bolt that followed, Field was one of the leading supporters of Van Buren and Charles Francis Adams on the platform of no more extension of slavery. He wrote the address of the Democratic-Republican Committee to the electors of the state, he delivered speeches in halls and churches and parks in New York, and supported the campaign in New England, making a ringing speech in Faneuil Hall. In the attempt to force the admission of California as a slave state, in the repeal of the Missouri Compromise, and in the struggle over Kansas, the slavery interests found Field a prominent and powerful foe.

He labored unceasingly to effect the consolidation of the Free Soilers and the Anti-Slavery Whigs which resulted in the formation of the Republican party, he supported Fremont in speeches throughout New York and Pennsylvania, and in consequence he was charged with disloyalty to his party. The following strong letter, dated May 22d, 1856, he wrote to the Albany Atlas:

Though I have not hitherto acted with the Republican party, my sympathies are of course with the friends of freedom, wherever they may be found. I despise equally the fraud which uses the name of Democracy to cheat men of their rights; the cowardice which retracts this year what it professed and advocated the last; and the falsehood which affects to teach the right of the people of the Territories to govern themselves, while it imposes on them Federal Governors and Judges, and indicts them for treason against the Union because they make a constitution and laws which they prefer, and collects forces from the neighboring States and the Federal army to compel them to submission.

By this time Field was known through all the country. He was a recognized leader of the bar. His codification fights in the New York legislature had given him a wide reputation. Thus his name as well as his personal force and public activity in the long conflict was of much value to the Abolitionists in the gathering of their strength. But it was in that critical hour at the Republican National Convention of 1860 when Abraham Lincoln's nomination for the Presidency hung in the balance that Field rendered perhaps his largest political service.

In his "Life of Lincoln," Henry J. Raymond, the

founder and editor of the New York Times, a man who was familiar with the whole history of American politics, and who was present at the Convention intensely desirous of Seward's success, makes the following statement:

On Thursday, the 17th of May, the Committee on Resolutions reported the Platform, which was enthusiastically adopted. A motion was made to proceed in the nomination at once, and if that had been done, the result of the convention might have proved very different, as at that time it was thought that Mr. Seward's chances were the best, but an adjournment was taken till the morning, and during the night the combinations were made which resulted in the nomination of Mr. Lincoln.

Mr. Seward's chances were indeed thought the best. Everything pointed to his nomination. On the eve of the decisive day Thurlow Weed, manager of New York politics, "Maker of Presidents," said, "I am sure of success;" Evarts declared, "Victory is certain and will be rapid." At midnight Horace Greeley, who was strongly opposed to Seward's candidacy, telegraphed to the Tribune in New York that the opposition could not concentrate upon any candidate, and that Governor Seward would be nominated. Yet when the morning came, Abraham Lincoln proved the man of destiny.

After dispatching his message, Greeley had gone back dejected and exhausted to his delegation's quarters in the Tremont House. In this chamber, called by Thurlow Weed "The Conspirators' Room," Field, George Opdyke, Hiram Barney and James



Briggs were discussing the situation when Greeley came in and threw himself down in a state of collapse, exclaiming, "All is lost. We are beaten."

"No," thundered Field, "we are not beaten. Get up and we'll go to work."

His energy inspired Greeley with new life. Together the two men went out to renew the struggle. From delegation to delegation they went, arguing, explaining, persuading. As the dawn broke, Field said, "The work is done. Lincoln will be nominated." In the afternoon a western delegate pointed to Field and said, "See! there's the man who nominated Lincoln."

After Lincoln's election came secession. Then during the last month of Buchanan's administration, Virginia, reluctant to go out, made a last effort for adjustment of the difficulties. The Peace Congress was called in Washington. Twenty-one states responded with one hundred and thirty-three delegates. Foremost among these was Field, heading the New York contingent. Again he was an impressive figure in a historic scene, this time making the last plea for arbitrament by reason rather than the sword, entreating a general convention, but giving sad warning that the North would never sacrifice the principles of Union and the Constitution to the expediency of an empty peace. But the South was past persuasion and Sumter was fired on. After that Field was as ready to fight it out on that line as the great General Grant himself. Throughout the war his

resolute spirit and courageous counsel were of exceeding value. Repeatedly he was summoned to confer with President Lincoln and his cabinet. In New York the mayor so leaned upon his advice that at the time of the draft riots he summoned Field from Massachusetts to assist in quelling the disturbance. Everywhere Field did much to inspire confidence in Lincoln and to draw support to his policies. Yet when the war was over, the South had no defender more jealous of her rights, no son more bent upon securing them. For in those stout Reconstruction contests in the nation's Supreme Court, Field fought as sturdily for the integrity of the Constitution and the South, as before the war he had fought for Union,—the Constitution and the North.

—Such place did Field hold in the courts and in the larger forum, among that aristocracy of lawyers to whom the direction of the nation was repeatedly given throughout the nineteenth century. Such were his legal victories and mistakes, such his service to national ideas, and, since the outward is determined by the unseen spiritual, such the man. Commanding and worthy, however, as were his professional success and public service, it is as the champion of law reform that Field achieved his greatest triumphs and did his greatest work; and it is in Field the reformer that the heroic qualities of Field the man are most strikingly revealed.

Never was Field slavish to hearsays. Always he exercised the right of private judgment. The spirit

which wrenched him from the Federalism of his heritage awakened his criticism of existing legal systems, stirred his desire to break with the past, riveted him to unshakable belief in his convictions. Very early in his reading of law it was that Field conceived his antagonism to the complex double procedure in Law and Chancery which the American states adopted from England upon the establishment of the independent government, a system clogged with artificialities, always productive of delay and expense, often perverse of justice. Nor was his antagonism the result of hasty conclusions. Field was widely read and it was often said of him that if ever there was anything which he was master of, it was the old practice at common law and in equity. Besides, thought of reform was abroad in the world, constraining men in England, Louisiana, Massachusetts. Bentham was calling for codification, Brougham was inquiring "into the defects occasioned by time and otherwise in the law realm, and into the means necessary for reducing the same;" Edward Livingston was drawing codes in the South; Judge Story's New England commission was reporting against codes but favoring the reduction of procedure to a more simple form and relieving it of some of its "cumbrous and inconvenient appendages." Yet despite Bentham and Brougham, England pronounced against the abandonment of existing forms of action. Livingston, although he was far ahead of his time and although in his draft of the proce-

ture in the Louisiana courts he made the earliest radical improvement upon purely common law methods, nevertheless followed to a great extent the arbitrary rules of the common practice. Thus it was that after much rather abortive consideration elsewhere of common conditions, Field in New York in 1839 began the agitation for radical reform in the administration of remedial justice.

It would be a task beyond the limits of this paper to trace his herculean labors in the ensuing years. The then existing system was imbedded beyond legislative remedy in the state constitution of 1821, and five years must pass before the next constitutional convention. Meantime public opinion was to be educated, even created. A letter to Gulian C. Verplanck on the reform of our judicial system was Field's first printed word. This was followed by open letters, newspaper articles, addresses and arguments before legislatures and legal societies, with the result that at the Constitutional Convention of 1846 the Judiciary Committee reported two law-reforming provisions, one looking to a general code, the other embodying Field's suggestion of a single Court having general jurisdiction in both law and equity, and authorizing legislative appointment of "commissioners to revise, reform, simplify and abridge the rules of practice, pleadings, forms and proceedings of the Courts of Record."

This Constitution was approved by the people and took effect January 1, 1847. To procure the ap-

pointment of the commission fifty New York lawyers, among them Vice-Chancellor McCoun, Charles O'Connor, E. P. Hurlbut, F. B. Cutting, Theodore Sedgwick, James J. Roosevelt, Joseph S. Bosworth and Erastus C. Benedict, presented to the legislature a memorial drawn by Field, reciting in part as follows:

The undersigned members of the bar are persuaded that a radical reform of legal procedure in all its departments is demanded by the interests of justice and by the voice of the people; that a uniform course of proceeding in all cases legal and equitable is entirely practicable and no less expedient; and that a radical reform should aim at such uniformity, and at the abolition of all useless forms and proceedings.

Soon afterward, in April, 1847, the legislature appointed the commission consisting of Nicholas Hill, David Graham and Arphaxed Loomis. Field was omitted as too radical, but by fall legislative sentiment had changed, and upon Hill's resignation, Field was appointed in his stead. The work of devising a new system and arranging its details then went briskly if laboriously forward, the brunt of it cheerfully assumed by Field, and on the first day of July, 1848, there went into effect a Code of Civil Procedure which embodied the desired reforms in civil practice. Additions and amendments to this code enlarging it to 473 sections, submitted to the legislature in the following January, were enacted and went into effect in 1849.

The foundation of the new procedure was laid in

the abolition of the separate and distinct jurisdictions of Courts of Law and Courts of Chancery and in the vesting in one tribunal, the Supreme Court of the State, general jurisdiction both in law and in equity. Previously existing forms of action likewise were abolished and in the stead of fictitious methods of pleading were to be plain, concise statements of fact. For pleading at law, although originally oral and simple, had ultimately developed into a system of highly technical and formal rules requiring the greatest precision in their application and often by their very formality and rigidity defeating rather than aiding justice. Thus in the common law pleading called the declaration, the facts were required to be stated according to their legal effect only and it was not permissible to set out the evidence on which the plaintiff relied; further, owing to the tendency of the early lawyers to adopt fixed forms of statement and to their adherence to precedent, the declaration was required to conform to one of a limited number of rigid forms, and if a plaintiff could not adapt to one of these forms the state of facts upon which he based his right to recover, he was without remedy. Field's code therefore abolished these forms of action and allowed facts to be pleaded without formality, the general object in this and all the changes being to make the system more simple and just in its application, and to avoid the determination of rights upon purely formal grounds.

Another important change was that defenses and

counterclaims hitherto only equitable, that is, available only in suits in Equity courts, were allowed in all actions, so that one who formerly had to begin a suit in Chancery to enjoin an inequitable use of process at law might now state his objections as a defense to the action brought against him in the court of law. Similarly the power before exercised only by a chancellor in equity to compel parties to testify and to produce books and papers, and to require an oral examination of witnesses upon the trial was conferred also upon the judge in actions at law. Further, if the proof given at the trial should vary from the pleadings, instead of a dismissal of the action on the ground of that variance as was formerly necessary, a correction of a minor discrepancy was to be allowed by amendment of the pleadings, even to the extent of supplying an omitted allegation, and the action was not to be dismissed unless the case proved were radically different from that pleaded, since only in the latter event could an adverse party fairly, not technically, plead surprise.

It must not be assumed, however, that such innovations as were necessitated by the adoption of these four leading principles of the reformed procedure were unanimously or even readily accepted by the bar of the state. Repugnance to change is natural and there was fierce objection to the proposed abandonment of century-old abuses. Opposition was encountered within and without the legislature. Only the outworks of conservatism were carried. The

practice commission made its final report in 1850 but its proposed Code of Criminal Procedure was not adopted until 1882, while the complete Code of Civil Procedure submitted at the same time was never enacted. The latter, many lawyers considered model in matter and manner. Its 1885 sections not only contained a thorough revision of the 473 sections then in force, but treated fully "Special Actions" and "Special Proceedings," not previously included in the code but provided for elsewhere by statute, and embodied the practice in matters of evidence as based upon the principles and rules scattered throughout statutes and reports. Yet such was the hostility to the complete code, especially to the part relating to evidence, that it was not adopted either in 1850 when it was first submitted or in 1853 when Field presented it revised and slightly condensed.

So for nearly thirty years the original code continued in force, unamended until revised by the Revision Commission of 1870. That body had been appointed by chapter 33 of the laws of 1870 "to revise, simplify, arrange, and consolidate *all statutes* of the State of New York *general and permanent* in their nature, in force at the final report of the Commissioners." Under this authority these commissioners headed by Throop proceeded not with a revision of the general statutes, which was thereby delayed for twenty years, but with a revision of the Code of Procedure. Whether this work was within



the spirit and intent of the legislative act it is useless now to discuss. It is reasonable and fair, however, to believe that had any considerable modification of the practice been intended, Field, as the deviser of the reformed procedure and as the most competent man alive for the prosecution of its revision, would have had a place on the commission. Further, it is not amiss to say that the efforts of these commissioners were not distinguished by the close analysis, logical arrangement, and clearness of statement which were notable in Field's work. The complete code which he had planned was evidently before the commissioners of 1870 and was recognized to a slight extent in their work, but it was rearranged, rewritten in complex phraseology, and expanded from 1740 sections to double that number, although much of the matter Field had treated was omitted. Only after bitter controversy and upon the understanding that it should soon be amended was the resulting code adopted in 1876.

Meanwhile the original Field Code which in 1848 and 1849 had contrived to slip past the legislature into the statutes, the admirably simple little book which Throop's unwieldy volume so unfortunately superseded, made a name for itself, and before the last outcry against it in New York had died away, it had been adopted in a score or more of states and territories. Even conservative states where the name of code is not spoken copied it, incorporating its leading principles into statutes designated as "Prac-

tice Acts." England, impressed with what America had done, appointed a Parliamentary Committee and a Crown Commission to consider the whole subject of law reform. Twice when Field was in London there was paid him the high compliment of an invitation to meet with these committees and to explain the methods and extent of the code pleading which he had inaugurated in New York. Two years after the first occasion, in 1853, England effected a partial though slight union of law and equity. At the second meeting, in 1867, there were present the most eminent legal authorities in the United Kingdom, including five Lord Chancellors. The conference lasted until late into the night. At its close Lord Hatherly grasped the American lawyer's hand and said, "Mr. Field, the State of New York ought to build you a monument of gold." That same year John Bright said, "I wish we had in England a man to do for us in the way of reform of the law what Field has done for America." The London papers spoke of Field's visit and statements as real events in the progress of English law reform and not long afterward a substantially statutory form of pleading and practice was adopted by the Judicature Acts of 1873 and 1875, which abolished the Court of Chancery and established the Supreme Court in conformity with Field's theory. Following the example of the mother country, sixteen British colonies and dependencies enacted the code's chief features, and in 1874 when Field went around the world, he had the

pleasure of finding his system of practice in use in the courts of India.

Field had been impatient of the over-refined technicality, the interminable delay, the burdensome expense of the processes of civil justice. He had endeavored to provide for New York state a method whereby simply, expeditiously and inexpensively litigation might perform its function of superseding private controversy, and lo! he had devised a system almost universally adopted by English-speaking people; a system which taught men to look upon the law as something more than time-honored tradition, and made forms dignified by centuries of usage an aid to modern civilization rather than a drag upon its institutions. Truly a great thing for his first dim thought of a new path to grow into, this Appian way whereon the world might travel.

—But the changes thus wrought in the adjective law were only the first step in the reform which Field had in mind for the whole body of our jurisprudence. The substantive law which had been applied by England in the colonies and which upon the Declaration of Independence had become the law of the individual states cannot from its nature be found in any one book or digest. It does indeed consist of rules whereby the standard of justice is applied to known facts or conditions; but, based upon custom, the growth of the united wisdom and experience of Englishmen for centuries, these rules far from ever having been absolutely declared have been only grad-

ually developed and provisionally prescribed in their application now to this, now to that set of facts in the unnumbered thousands of cases which have been decided since Angles first lived in Britain. Thus the customary or common law has come down to us, undeclared, unenacted, even unwritten, save as judges have chanced in opinions to set forth the precedents and analogies which have guided them to the judgments pronounced, or as commentators and text-writers have discussed, related and recorded the principles which they have discovered by elaborate study and collation of decisions. Besides being thus unwritten and having to be sought in a vast unwieldy mass of cases, the common law abounds with confusion resulting from contradictory precedents. For the decision of one of two courts of concurrent jurisdiction does not necessarily bind the other, and even a new decision of a court of appeals is not always supported by that very court in subsequent cases, so that often precedents almost equal in authority and number may be quoted on both sides of a given question. Thus it comes to be said that lawyers cannot know the law in any suit until the judge shall have rendered his decision in that very case, while clients experience the working of Jeremy Bentham's remark though they may never have heard of his question: "Do you know how judges make the common law?" and his indignant answer: "Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he

does it and then beat him for it, and this is the way the judges make law for you and me."

'That this codeless myriad of precedents, this wilderness of single instances could be reduced to form and system was Field's strong belief. He contended that "by casting aside known rules which are burdensome or unsuitable to present circumstances, avoiding repetition, rejecting anomalous or ill-considered cases, reconciling repugnances, molding into distinct propositions and classifying according to scientific method," it was possible to harmonize and order the different branches of the law, and then to enact the whole into a comprehensive code which should make known the sum of man's rights and obligations. In short, Field's conception was "all law reduced to a statute so that a man might carry in his hand all that the state ordained for the regulation of human conduct."

His plan for such an arrangement of the law was five codes:—those of Civil and Criminal Procedure already referred to, containing all of the adjective law necessary for bar and bench to know concerning the administration of civil and criminal remedies; and the Political, the Penal, and the Civil Codes containing the substantive law, the first embracing the administrative system of the state which public officers and those dealing with them need to know, the second specifying crimes and their respective punishments, the third treating the civil rights and responsibilities of members of a community in re-

spect to personal relations, property and obligations. Such a statute Field held would confer large benefits upon all men. It would settle long disputed questions, and make possible reforms which only comprehensive and simultaneous legislative acts could effect. It would render the law accessible to lawyers enabling them to dispense with the numbers of books which now encumber their shelves and would save an enormous amount of labor by doing away with long searches through reports, examinations of cases, and drawing of inferences from decisions. Moreover, it would bring justice within the reach of all, diffusing among the people in simple, untechnical language a more general and accurate knowledge of their rights and obligations than they could otherwise obtain.

This conception the well-known late Austin Abbott, a close friend of Field's and long his devoted assistant, considered noble in its breadth and simplicity, admirable in its clearness, but conceded that its feasibility or the usefulness of any practical execution of it was hardly indisputable. The difficulty of the task Field himself admitted. That most acute and industrious master of literature, Macaulay, after personal experience as a member of the Supreme Council of India, declared codifying the law to be among the most laborious and perplexing tasks upon which the human mind can be employed. John Austin, most scientific of scientific codificationists, believed the question of codification to be a question

of time and place, that while in the abstract without reference to the circumstances of a given community a complete code is undoubtedly better than a body of judiciary law, yet in the concrete with reference to the expediency of codification in a given community, a doubt may arise. He says:

For the existing law must be contrasted not with the beau ideal of possible codes but with that particular code which in a given community an attempt to codify would then and there engender. And that particular and practical question turns mainly on the answer that must be given to another, namely, "Are there men, then and there, competent to the difficult task of successful codification and of the production of a code which on the whole would more than compensate the evil that would necessarily attend the change in question?" For whoever has considered the difficulty of making a good statute will not think lightly of that of making a good code. To conceive distinctly the general purpose of a statute, to conceive distinctly the subordinate provisions through which its general purpose must be accomplished and to express that general purpose and those subordinate provisions in perfectly adequate and not ambiguous language is a business of extreme delicacy and of extreme difficulty, although it is frequently turned over by legislators to inferior and incompetent workmen. And what is commonly called the technical part of legislation is incomparably more difficult than what may be styled the ethical, it being far easier to conceive justly what would be useful law than so to construct that same law that it may not fail to accomplish the design of the law giver.

Nevertheless, despite the acknowledged embarrassments of codification, the prodigious labor involved in it, Field not only invited the task; he created his opportunity to undertake it. In 1839, at

the same time that he began by his letter to Verplanck the public agitation for reform in procedure, he began also his advocacy of codification of the substantive law. So effective were his efforts that the Constitution of 1846 contained, as will be remembered, not only the provision for the appointment of the Pleading and Practice Commission but also one looking to a general code and authorizing the legislature to appoint a commission for the making of a draft-code with the view of ascertaining whether there could be accomplished such a codification of the common law in whole or in part as would promise a public benefit sufficient to justify the legislature in adopting it. This commission was appointed by the legislature in April, 1847, but its personnel underwent many changes and when in 1850 its members upon reporting the revision of a mere fragment of the law, which they did not even recommend for adoption, expressed grave doubts as to whether the work assigned to them could or ought to be done at all, the legislature not unnaturally abolished the commission by repeal of the appointing act. "The commission failed entirely," said Field, "and it failed because the men appointed to it had no faith in the codification of the common law. They thought only of a new revision of the statutes. We wanted no revision. We wanted codification."

Field was now less well off than before the commission had been appointed. The bar throughout the state was trying to adjust itself to the new condi-



tions in practice created by the adoption of the Code of Civil Procedure and in its consequently critical temper was not favorably disposed toward further reform even of procedure. The general skepticism was confirmed by the dubious report of the code commissioners, and the abolition of the commission suggested the propriety of burying any serious hope of codifying the common law. Yet Field while disappointed was not to be dissuaded from his design. "To resuscitate the commission was like raising the dead." Nevertheless he attempted it and in April, 1857, after seven years of endeavor he accomplished the passage of an act appointing a new commission "to reduce into a written and systematic code the whole body of the law."

This time Field was at the head of the commission. The other members were two lawyers of large and varied practice, of high repute for intellectual ability and professional skill, Alexander W. Bradford and William Curtis Noyes, the latter of whom however died in 1864 before the codes were reported. Except during the first two years no compensation was allowed the commission but throughout all the years during which the work was prosecuted a large corps of assistants was employed at Field's expense and thus the task progressed with some celerity despite its magnitude. The labors of none of these coadjutors, among whom were such men as Austin Abbott, B. V. Abbott, Charles F. Stone and Thomas G. Shearman, is it intended to ignore or detract from,

yet doubtless no one of them would hold it invidious or unjust to say that it was Field who did the lion's share of the vast amount of labor performed. That he should have worked with greater ardor and intensity than his fellow commissioners is hardly surprising, however, since the making of the codes was the passion of his life, the work which he was first to suggest, and the most determined to carry through. The only point for comment is that this labor of love was not part of the day's work but was accomplished in hours deliberately snatched from sleep. Although already he was doing more than one man's work and was constantly occupied upon most important matters in both state and federal courts, his systematic exercise out of doors and his maintenance of habits almost military in their precision helped him so to conserve his strength and economize his time as to be able to carry the additional burden of the codes. Even so a man of less enthusiastic determination could scarcely have stood the strain of labor continued from early morning till long after midnight, not merely day after day and week after week, but month after month, for eighteen years; and it is the more remarkable that Field should have had such marvelous physical capacity for work since in early life he was not of robust constitution, almost indeed losing his health before he learned to preserve it. Yet night after night Field added a day's work to that already done, personally preparing large parts of the Civil and Political Codes,

as well as planning, directing, and revising the whole work; for as soon as any part of the code was finished, a draft of it was distributed among judges and lawyers and after their examination and criticism it was rewritten to conform with wise suggestion.

The undertaking covered nearly ten years and it was not until 1865 that the commission in its ninth report submitted to the legislature the last of the three draft codes. The experiment contemplated by the Constitution of 1846 had now been made. An examination of the finished codes was possible and the time had come for the legislature to perform its responsible duty of determining the momentous question whether it were expedient for such codes to supersede the existing law. The opponents of codification were ready to do immediate battle against the innovation but that necessity did not at once arise. To Field's disappointment the legislature to which the codes were reported failed to take favorable action upon them, indeed scarcely took notice of them. Field appeared before Senate and Assembly committees of every succeeding session, but the Code Commissioners' report slept in the limbo of a legislative pigeon-hole until the winter of 1878-79 when the bar of the state was startled by the Civil Code's adoption in both houses of the legislature. Seldom if ever was there such a legal battle as that which then waged,—for ten years a conflict of doubtful issue. Field's adversaries succeeded in securing Governor Robinson's veto of the measure, but Field would not

admit defeat and almost alone fought on with dauntless courage. Year after year through his persistence the bill came up, passing now Senate, now Assembly, and even once more passing both houses, only again to receive the executive veto, this time from Governor Cornell. After this second egregious failure, Field steadily lost ground until 1887, when the last battle royal was fought out before the Senate Judiciary Committee and Field's arch opponent, James C. Carter, made the master objections which finally fixed the legislature's opposition and practically settled the long drawn-out controversy.

This conclusive argument of Carter's was that advanced by him in his paper on "The Proposed Codification of Our Common Law," a monograph which is perhaps the most elaborate and comprehensive objection ever made to codification in this country and worthy to be ranked with Savigny's famous work, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, "On the Vocation of our Time for Codification and Jurisprudence." Field's Civil Code, Carter considered should be peremptorily condemned as a grossly defective work, heavily charged with positive error and mischievous uncertainty; but his chief argument against its adoption was not the imperfection of this particular attempt at codification; it was his belief that any attempt at the codification of the unwritten law, with whatsoever skill prosecuted, proceeds upon a false theory and is an erroneous move in legislation. And this is the

view of a preponderating number of judges, jurists and statesmen. Since Bentham's time there have been among thoroughly educated lawyers comparatively few advocates of codification. Of these, John Austin, Sir James Fitzjames Stephens, Sheldon Amos, and Sir Frederick Pollock in England, Field and Livingston in America, have been the best representatives. To the deliberate opinions of such men is properly due, as Carter said, great respect; but the theorist all too generally opposes the conclusions of the cloister to the evidence of facts, and it cannot but be felt that these distinguished Englishmen, while not monastic, have the point of view of professors rather than practitioners of the law, and have undervalued the teachings of actual experience. While they admit that no argument for codification can be found in the practical experience of any nation, they nevertheless assert that this failure does not disprove the feasibility or the expediency of codification. They may have observed that line of demarcation between written and unwritten law which nations have unconsciously drawn by confining the development of their statutes to the province of public law in which necessity of certainty predominates over that of exact justice, and leaving wholly to unwritten law that large domain of private interests and relations wherein the necessity and advantage of exact justice predominate over those of rigid certainty; but they have failed to recognize or acknowledge in this nice distinction, as unerring as it has

been unconscious, a fundamental law eternally prohibitive of complete codification in that at the same time that it designates written law as the better means of securing certainty, it establishes unwritten law as a superior means to the attainment of justice.

Notwithstanding their disbelief in this distinction, however, the English codificationists admit that the conversion of unwritten law into statutory form is a dangerous experiment not to be undertaken in the absence of men fully qualified for the task. Amos would require the devotion of many minds, among them special masters of each branch of the law, during many years, and a million of dollars to secure their attention to code-making to the exclusion of any other occupation. Thoroughly in agreement with Amos as to these points Carter criticized harshly Field's methods of codification. He did not believe that a general code worthy of the name, could be produced by men who were actively engaged in such an absorbing occupation as the general practice of the law and who gave to their code-making only such hours as they could snatch from more engrossing demands. Examination of the code confirmed his distrust of it and led him to pronounce it "grossly defective." And indeed his deadly analysis of the chapter on General Average could leave no doubt even in a layman's mind that in that division at least Field had not only failed to accomplish his own claims for codification, but had committed blunders grave and pernicious. Nor can Carter's severe con-

demnation be discounted as proceeding from prejudice, in view of the equally harsh judgments passed on the code by two advocates of codification. Sir Frederick Pollock called it a "mischievous failure;" Amos described it as a code which if not worthless for New York would be worse than no code at all for England, because of its inaccuracies of expression and its utterly undigested form borrowed from Justinian's Institutes and the Code Napoleon, "a code which in every line violates a familiar principle or introduces a novel terminology, and yet is consistent in doing neither."

Such adverse criticism of the Civil Code was general. Yet because of the difficulty of the task, Carter thought that the inadequacy of its performance should not be regarded as an impeachment of Field's abilities. Necessarily it reflected unfavorably upon his qualifications for the work and the trustworthiness of his recommendations, but if apology were necessary, the conditions under which he worked were excuse for errors not structural. And a reason why circumstances prohibitive to other men qualified for code-making should not have deterred Field from so exacting a work was perhaps not that he was fundamentally less conscientious and scholarly or intellectually acute, but that he was the incarnation of the belief that the way to codify was to codify. To him, the incautious prisoner of his idea, "Adopt the code, with all its errors, and amend it afterwards" was not the reckless and amazing proposal it seemed

to Carter. Besides, it must be remembered that the remarkable growth of our young nation early began to necessitate such immediate modifications in the common law as demanded the rapid and trenchant operation of statute rather than the slow, cumbrous methods of judicial legislation. Only through the activity of state legislatures during a long period have we thus speedily reached our present approximately stable equilibrium in which is found an almost complete adaptation of eighteenth century common law to existing social needs. Most of the sharp changes were made during the first fifty years of our national life but even in 1850 the tendency to legislate was far from spent and in codification or complete enactment found its extreme expression, inevitably resulting in a Field. This encroachment of legislature upon judiciary ceased, however, with the necessity for it. After the greatest positive changes had been effected, it practically confined itself to that province appropriate to statutory law,—those portions of both public and private law where the general social interest is best realized by the imposition of positive restrictions upon the individual. The divisions of the law where the social interest demands the freest play of individual activity were left to the slow, cautious legislation of the courts. To this operation of the tendency toward legislation, its own extreme expression in a sporadic inclination toward codification formed the only exception. This exaggerated impulse was felt chiefly in states where



the experience of government had been shortest and thus it was that while Field's Civil and Political Codes were rejected in New York they were accepted by Dakota, California and Montana.

For Livingston's code in Louisiana the *raison d'être* was very different. In that state as in France and Prussia there was a political necessity for an extension of the province of legislation over the field of private law, arising from the competition of Spanish, French and American law for supremacy. Uniformity could be effected only by statute and the reduction of discordant systems to unity could most completely be accomplished by codification of the whole law. But the usefulness of codification for attainment of political objects in America or dynastic ones in Europe is no proof that it is an improvement of the law. Indeed it is to be observed that the use of codes in this country has not been unattended by the evils incident to the system abroad; they are overgrown with judiciary law and amendment is continuous. In the western states not one of the practical advantages prophesied by Field can be pointed to as realized.

Thus Field demonstrated neither the necessity nor the practicability of codification, but his very lack of success has had a large influence for good upon American legal thought and action. By his mistakes we have profited as England profited by Bentham's. A nation knows not a truth until it has contended therefor. We know that legal rules and legal ex-

pressions cannot be severed from their roots in the past. We know that it would be little short of madness to exchange our system of jurisprudence, which has unity and continuity and has become what it is in virtue of the natural growth and development of free institutions through centuries of time, for that of foreign and monarchical states, which was originally adopted for political and dynastic reasons, and which in practice falls far short of our own. We know that no code can be complete and self-sufficing, or will ever relieve from the necessity of research into the case and statute law of the past. We know that codification here is indeed the "delicate business" Austin called it. But we have also learned through Field as England learned through Bentham that many of the difficulties of law are due to confusion of thought, to obscurity of expression, to want of orderly arrangement; and in his avowed object "to reduce the bulk of the law, clear out the refuse, and condense and arrange the residuum so that the people and the lawyers and the judges may know what they have to obey and practice," Field set up an ideal toward which legislation should tend, an ideal which has left its impress upon our statute book.

In the province of international law also Field labored. His efforts here were by no means the least diligent of his endeavors to secure simplicity and certainty in the law and its administration and of themselves alone these would have brought him in-



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agreement, with resort to a Tribunal of Arbitration consisting of representatives of nations friendly to both disputants, in case of the Joint High Commission's failure to effect a settlement of the differences.

This compilation with its lucid formulation and scientific arrangement of great principles embodying a consensus of opinion on the whole domain of law, Austin Abbott considered Field's crowning achievement and an accepted authority. It attracted the attention of the whole world and was translated into French, Italian and Chinese. In its proposed substitution of arbitration for the horrors of war it gave an impetus to the then young peace movement and directly helped to elevate the ethical standard of the nations. But it was never adopted by the governments whose representatives had so enthusiastically voted its preparation. As Lord Chief-Justice Russell said in substance before the American Bar Association:

The attempt to codify international law has made little way toward success. Its rules are not to be traced with the comparative distinctness with which municipal law may be ascertained, and if codification of municipal law has a tendency to arrest progress, how much less favorable a field for such an enterprise is presented by international law where so many questions are still indeterminate, and where to codify would be to crystallize into inflexibility rules still in process of development.

But Field did not believe that he had attempted the impossible. He had faith in his code and preached it, believing its adoption would promote a

better understanding among the nations; and during the last twenty years of his life, after the completion of this code, he never neglected an opportunity to help to cement the bond of brotherhood. Never did he hesitate to cross the Atlantic to address, in the interests of peace and good will, gatherings at which he was the leading spirit and bodies of which he was the honored head. Year after year found him in Europe at meetings of the Institute of International Law, the International Association for the Reform and Codification of the Law of Nations, or the Social Science Congress, and 1890, the last working year of his active life, saw him at the age of eighty-five presiding with virility and charm over the Peace Congress in London, still doing his part to promote that condition which he thus eloquently pictured:

In some happier age, under some more benignant star there will yet, we would fain believe, be established among men a great Amphictyonic Council of the nations, with a wider sway than the Council of Greece, to which nations will submit as individuals now do, with unfaltering deference to a court of honor.

Four year's later Field was gone. Though his intellect never grew old, his once iron frame was at length feeling the burden of its nearly ninety years. In April, 1894, Field returned from a Christmas in England with his daughter Jeannie, the widow of Sir Anthony Musgrave, and a last sojourn in Italy. He had made an excellent voyage but a cold taken upon landing and a recurrence of a former

heart trouble caused his death within twenty-four hours.

Thus closed Field's long and splendid career. That a great personality had passed was everywhere recognized, and every public tribute was paid his memory. The legislature and courts adjourned, eminent men crowded to his funeral to do honor to the great lawyer who had gone to his rest in the fulness of age, in peace after many conflicts, in honor after much obloquy. Erie might not be forgotten; nevertheless Field compelled admiration and respect not alone for the amplitude and fertility of his intellect but for his truly great qualities of sincerity and persistence, his undaunted boldness and fortitude not to be wearied, his rare talent for controversy. For Field was a fighter always in the battle's thick, no tardy coward to whom a Henry IV might say: "Hang yourself, Crillon! we fought at Arques and you were not there."

All of Field's activities were useful, liberalizing and enlightening, but the performance which has laid the world most heavily in his debt and for which he will longest be remembered is his earliest effort, the Code of Civil Procedure, which ranks as the best creature of his intellect. Of the man himself, however, the crowning achievement was that fruitless struggle for the codification of the common law. Not what men believed but what *he* believed, Field spoke. Amid ridicule, aspersion, opposition, he stood firm, "clinging to his Ark of the Covenant,

fighting for it in the face of all unendurable odds." Who shall say that this was not Heroism, Heroism with its eyes shut, if you will, as Carlyle said of Bentham's Utilitarianism, but Heroism none the less, since Heroism dwells in just such complete and fearless committal of self to what is believed true. And if men live not by debating many things but by believing a few, who can have lived more truly than this believer in codes and justice and peace; this man who in the words used of Landor "warmed both hands at the fire of life;" whose life purpose is thus recorded on his tomb:

He devoted his life to the reform of the law:

To codify the common law;

To simplify legal procedure;

To substitute arbitration for war;

To bring justice within the reach of all men.

THOMAS WILSON DORR.

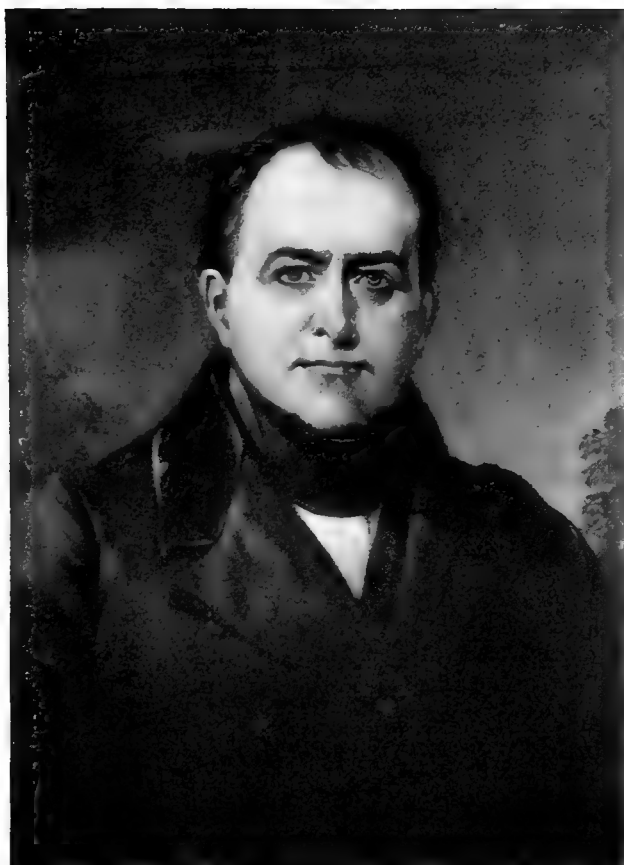




THOMAS WILSON DORR

From an engraving by W. Warner of a daguerreotype in possession  
of the Rhode Island Historical Society at Providence, Rhode Island.







# THOMAS WILSON DORR.

1805-1854.

BY

AMASA M. EATON,

*of the Rhode Island Bar.*

SOMETIMES a man is born, he lives and dies so far in advance of his times, circumstances and surroundings that he is not understood or appreciated until a later day. Then the way opens for appreciation of the principles for which he in vain contended. He may have had intellect, character, education that gave him insight into principles but dimly appreciated by those about him, or which were ignored or denied because in conflict with selfish vested interests. He may have followed his convictions and his sense of duty to their logical conclusions, and as a result he may be called an impracticable visionary, an abstractionist, a seeker for office, a disturber of the public peace, although his motives were pure and lofty, although he may never have misrepresented an opponent, however differing with him. He may never have deserted a friend, nor have surrendered principle to policy. He may have been so constituted that he could accept no compromise of principle, nor be able to understand that

others could arrive at conclusions different from those he had reached. Espousing a new and unpopular cause resting upon a profound principle and becoming its leader, he is looked upon as a renegade by the more timid and conservative minds of the social order that was his by birth and education. With victory almost within his grasp, he may find his sense of logic preventing concession, and the end is apparently a crushing defeat. But even so, he has not lived in vain. He has sown the seed that will grow and bear fruit. Later generations will bless him for the privileges and liberties they enjoy, the results of his labors and sacrifice, and at last he is recognized as a political reformer and a public benefactor.

Such a man was Thomas Wilson Dorr. He was born in Providence, Rhode Island, November 3d, 1805, and he died there December 27th, 1854. He was the son of Sullivan Dorr, a successful manufacturer, and Lydia (Allen) Dorr. His father was a descendant in the sixth generation of Joseph Dorr, a Massachusetts Bay colonist, about 1660. His grandfather, Ebenezer Dorr, was captured with Paul Revere upon the ride made immortal by the genius of Longfellow. He prepared for college at Phillips' Academy, Exeter, went to Harvard, and was graduated thence in 1823, with second honors in his class. He then studied law in New York, under Kent and McCoun, both afterwards eminent as equity judges and jurists. He was admitted to the bar in

New York and soon became recognized as a profound student of law. In later editions of his celebrated "Commentaries," Kent adopted various suggestions and changes made by Dorr.

Returning to his home in Providence, he began the practice of law, with the usual slow success; a success rendered, perhaps, even slower than usual because he was recognized as a student of law rather than as an active practitioner. In 1833 he was elected a member of the lower house of the General Assembly from the town of Providence and we find him now launched upon that public career that was to be his life-work.

He was a Federalist by birth and environment, but he soon became a Democrat from principle. This change was the first step in a course that estranged him from those who considered themselves as the patrician class, if there may be said to be such a class in this country. Democratic in essence as Rhode Islanders may be, yet, fostered perhaps by our long established system of admitting to the suffrage only those who owned land and their oldest sons, those thus favored had come to look upon themselves as members of a special, privileged class, admission to which was granted only to those possessed of the requisites mentioned. When the members of a new class, consisting of those who did not own land, began to suggest that possibly a man might be allowed to vote without owning land, the suggestion was frowned upon as almost a kind of sacrilege,



and those favoring it were looked upon as menacing danger to the Rhode Island established order of things. When, taking heart from their logic and convictions, these daring innovators maintained that the question of the enlargement of the suffrage should be decided by those who would become voters under the proposed enlargement, as well as by those who were already voters, the indignation of the latter class led them to impolitic steps that but added new impulse to the determination of many of those who were excluded from the franchise to get within the circle from which they felt themselves to be unjustly excluded,—and here, in a nutshell, we find the causes that led to the Dorr war.

Dorr's career in the General Assembly terminated in 1837, in consequence of the course he took in bringing to an end the peculiar "Bank process" then in force in Rhode Island, under which if a debtor failed to pay his note at bank by three p. m. on the day when it became due, an attachment, judgment, execution, levy and sale might follow the same day, so that before sunset of that day such a debtor's real estate might become the property of the bank holding his protested note, to the exclusion of the claims of all other creditors. Dorr wrote the report of the Committee that reported a bill which became law "limiting the banks hereafter to the same remedies for the collection of debts as are possessed by individuals in the state."

When the Revolution came in 1776, a general up-

heaval resulted in the formation of new governments in the various colonies. With the exception of Rhode Island and Connecticut all the colonies framed and adopted state constitutions. It was not necessary to do this in the two states mentioned, because the English charters they had were so democratic in form and each had in consequence so freed itself from the control of the Crown and Parliament, that each was already virtually independent and self-governed. Therefore, after the Revolution, these two colonies, becoming states, continued to rule themselves under the forms of their old charters. But as this was done without any formal sanction of the people, each of these two states, like England itself, carried on its government under an unwritten constitution. In 1842 many of the people of Rhode Island, probably a majority, under Dorr's lead, undertook to do what the people of the other colonies (excepting Rhode Island and Connecticut) had done in 1776 or soon after, i. e. to form their own constitution of government. Clearly the people of Rhode Island had the right to do this in 1776. Had they lost the right to do it because they put it off until 1842?

It is important to bear in mind that in 1829 it was decided by the Supreme Court of the United States in the case of *Wilkinson vs. Leland*,<sup>1</sup> the great jurist Justice Story, writing the opinion, that from the time when Rhode Island passed her own declaration

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<sup>1</sup> 2 Peters' Reports, 627.

of independence on the 4th of May, 1776, to the time when Story wrote the opinion aforesaid, and down later, to the time when the present constitution went into effect, on the first Wednesday in May, 1843, Rhode Island was governed under an unwritten constitution. There are some things that must be taken as established in our history, and this is one of them.

The General Assembly was even more powerful than the Parliament of England, for it had always exercised, and it continued to exercise, until the constitution of 1842, supreme legislative, executive and judicial powers. Just before 1842, it became felt by an ever increasing number of the people of this state, that the time had come when there should be some express limitation upon the powers of the General Assembly and an extension of the suffrage. A limitation on the powers of the General Assembly, by itself, would be of no avail, for whatever the General Assembly enacted it could, at any time, repeal. The General Assembly always had, at various times, enlarged and restricted the suffrage and it could enlarge it now, but it would not. The only way to bring about these necessary changes was through a state constitution, framed by a convention and adopted by the people. The people of the state, after much agitation and discussion, extending over many years, with the necessity for action steadily increasing, finally undertook to do, in the period ending in 1842, what the people of other colonies had

done in 1776 or soon after. The opposition to this course by the land-owning constituted authorities, brought about the Dorr war that ended in Dorr's personal defeat, but ultimately in the partial accomplishment of the establishment of the principles for which he contended. It remains yet to establish them more fully.

In 1724, the General Assembly passed an act limiting the suffrage to landowners and their oldest sons. With the decay of shipping and commerce after the Revolution and the War of 1812, the increase of cotton spinning brought into existence a new class in the state. It came about that the members of the class holding the government in their hands were not increasing in numbers in the same ratio that the members of the new class were, so that, through the exclusion from the suffrage of the rapidly growing class consisting of artisans, tradespeople and professional men, a minority was governing the majority. It is only by a peculiar and incorrect use of words we can call such a government "a republican form of government," for in reality it was an oligarchic government parading under the name of a republican form of government.

As early as 1797, George R. Burrill, a lawyer, brother of the United States Senator James Burrill, delivered a Fourth of July oration in Providence in which he dwelt on the necessity of a constitution for this state. He inquired, if a smaller number out of the whole choose the General Assembly, how can

this formation of a constitution be brought about? "To petition the legislation for equal representation is to require the majority to surrender their power—a requisition which it is not in human nature to grant." As if foreseeing the future, Burrill proceeded to say that unless there is power somewhere to bring about a change, Rhode Island would forever exhibit the paradox of "a free, sovereign and independent people desirous of changing their form of government without the power of doing it." The orator saw no remedy but in ignoring the General Assembly and in proceeding to form a new constitution independently of it. Forty-five years later this was what Dorr attempted to carry out.

Attempts were made in 1821 and in 1824 to call a convention to frame a constitution, but they all failed. The excluded class had not yet become powerful enough to insist upon extension of the suffrage, and the landowners still insisted upon their narrow provincial restrictions.

In 1829 many petitions for an extension of suffrage from the northern or manufacturing portion of the state were presented to the General Assembly. They were referred, in the House, to a committee of which Benjamin R. Hazard, a prominent lawyer, was chairman. He wrote the Report that recommended granting the petitioners leave to withdraw. This Report marks the beginning of the acrimonious spirit in which the privileged class treated this subject, a spirit that culminated at last in the Dorr war.

Dorr, afterwards, very justly characterized this Report thus:

This committee treated the application of the petitioners with scorn and contumely; described them as a low and degraded portion of the community; and reminded them that if they were dissatisfied with the institutions of the State, they were at liberty to leave it.

In 1834, the agitation for a convention to frame a constitution assumed new importance. Upon invitation from the towns of Cumberland and Smithfield, delegates from the towns of Newport, Providence and eight other towns, assembled in convention in Providence, to consult upon the "best course to be pursued for the establishment of a written constitution which should properly define and fix the powers of the different departments of government and the rights of the citizen."

Dorr was a delegate from Providence and was one of a committee of five to report to a second meeting. He was chairman of this committee and wrote its report. It brought him at once to the front as a leader. He attacked the charter boldly and gave convincing reasons why Rhode Island should have a new, written constitution. The Report opened with expressions of loyalty to the state and its founders. It asserted that "a discretionary regulation of the elective right and of the judicial system can never be properly and safely vested in the legislature." It pointed out the difference between a charter granted by a King to his subjects and a con-

stitution framed by the people for their own self-government. It said:

When the American States severed the political tie which formerly bound them to Great Britain, all obligation to acknowledge obedience to a British charter as a constitution of government was, of course, dissolved; and the people of each state were left free and sovereign. The people of each state, upon the happening of that momentous event, became equally tenants in common of the right of sovereignty; and all were equally entitled to a voice in directing what should be established as the fundamental rules of government. The sovereignty of the King of England passed therefore, not to the Governor and Company of Rhode Island, but to the people at large, who fought the battles of the Revolution, and to their descendants . . . That the people of Rhode Island retain their inherent right to establish (in their original sovereign capacity) a constitution, cannot for a moment be doubted.

The Report then called attention to the fact that such a constitution had been established in every state in the Union except in Rhode Island.<sup>2</sup> An examination was then made of the changes in the qualifications necessary to the exercise of the suffrage by the General Assembly, showing that sometimes the enfranchised had been disenfranchised, and sometimes the disenfranchised or the unenfranchised had been enfranchised, with further facts showing that the requirement of ownership of real estate as a prerequisite to suffrage, well enough in the early days of the colony, had now become unnecessary and had resulted in excluding a majority of the people from

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<sup>2</sup> Connecticut having adopted a Constitution in 1818.

the suffrage. In conclusion, the General Assembly was asked to call a convention, representative of the people at large, to prepare a liberal and permanent constitution, urging "that the same Legislature which has imposed on the citizens of Rhode Island a landed qualification not spoken of in the charter, has at least as much right to suspend it, for the single purpose of facilitating the exercise by the people, of the great, original right of sovereignty in the formation of a constitution."

These few extracts are but a poor summary of this statesmanlike document. It established the reputation of Dorr as one of the ablest men in the state.

At the June session of the General Assembly, this year, 1834, an act was passed, requesting the freemen qualified to vote for general officers to choose delegates to a convention "for the purpose of amending the present or proposing a new constitution for this State." The delegates were to be of the same number and of like qualifications as the members of the General Assembly, and the results of the labor of the convention were to be submitted to the vote of the existing electorate. Whatever enlargement of the franchise might be suggested, it would be within the power of the existing electorate to reject it, and it was well known that the existing electorate would vote down any extension of the suffrage. Accordingly the Convention was thinly attended, and it finally died out without doing anything. Evidently the constantly increasing class excluded from the



suffrage, desirous of admission and clamorous for a new constitution, could effect nothing until they could educate the conservative landholders to accede to their demands; or, failing in this, it was evident this excluded majority must take the control into its own hands and frame a new constitution without regard to the existing constituted authorities. This was the plan proposed in "An Address to the Citizens of Rhode Island who are denied the Right of Suffrage," a pamphlet of eight pages, purporting to come from the First Social Reform Society of New York, which was distributed throughout the state. It resulted in the organization of the Rhode Island Suffrage Association the same year, 1840, to inaugurate an agitation which should lead to a demand for a wider suffrage under a new, written constitution. The following is its declaration of principles:

Believing that all men are created free and equal and that the possession of property should create no political advantage for its holder, and believing that all bodies politic should have for their foundation a bill of rights and a written constitution wherein the rights of the people should be defined, and the duties of the people's servants strictly pointed out and limited; and believing that the State of Rhode Island is possessed of neither of these instruments, and that the charter under which she has her political existence is not only aristocratic in its tendency, but that it lost all its authority when the independence of the United States was declared and, furthermore, believing that every State in the federal compact is entitled, by the terms of that compact, to a republican form of government, and that any form of government is anti-republican and aristocratic which precludes a majority of the people from participating in its affairs,

and that, by every right, human and divine, the majority in the State should govern, and furthermore and finally, believing that the time has gone by when we are called upon to submit to the most unjust outrages upon our political and social rights. . . . Resolved, That the power of the State should be vested in the hands of the people and that the people have a right from time to time to assemble together, either by themselves or their representatives, for the establishment of a republican form of government. . . . Resolved, That whenever a majority of the citizens of this State, who are recognized as citizens of the United States, shall, by their delegates in convention assembled, draught a constitution and the same shall be accepted by their constituents, it will then be, to all intents and purposes, the law of the State.

An entire change of programme resulted. Instead of educating the people to demand changes in the government through the General Assembly, and a convention to be called by the General Assembly, "a peaceful revolution" was to be brought about by ignoring the constituted authorities. This was the beginning of the movement that culminated the next year in the Dorr war. Neither of the two parties, Whig or Democratic, inaugurated this movement. It was the result of the awakening to a realizing sense of their number, power and opportunity of the excluded classes under the leadership of Dorr and others, aided by the incapacity, the blind fatuity and the almost inconceivable bad management of the landholders and their leaders.

Petitions were now again presented to the General Assembly for enlargement of the suffrage and for a constitutional convention. Again, in Febru-

ary, 1841, the General Assembly called a convention to frame a constitution in whole or in part, but not having yet learned the lesson that only through an enlarged electorate that would be in consonance with the demands of the suffragists could a new constitution be adopted, it again left the question of the adoption or rejection of the new constitution to the old electorate of the landowners and their oldest sons.

The suffragists, as those were called who wanted an extension of the suffrage, and who became known as Dorrites, put no faith in this action of the General Assembly, in this renewed attempt to pacify them without granting them anything. Public meetings were held, especially in Providence, with discussion of questions, such as: "Is it expedient for the non-free-man to refuse to do military and fire duty?" . . . "Is it expedient for the non-freeholders to form associations for the purpose of military discipline?" Here we find the first hint of the use of force to accomplish their aim.

In May, 1841, the General Assembly made an attempt to conciliate the suffragists by a proposal to proportion the delegates according to the population of the towns. But as it was not accompanied by any enlargement of the suffrage, or what was perhaps of more importance, by any proposal that those who should vote on a new constitution would be those who would be voters under its terms, it was received with scorn by the Rhode Island Suffrage Association.

Meanwhile, in April, 1841, a grand parade and a mass meeting with a collation and speeches, was arranged for. It proved to be a greater success than had been anticipated and is of importance, as with it the Dorr movement was inaugurated. Thousands flocked into Providence and everyone turned out to see the procession pass by. The paraders wore the suffrage badge with the words: "I am an American citizen." They bore banners with appropriate mottoes, such as: "Worth makes the man, but sand and gravel make the voter" and what was more ominous: "Peaceably if we can, forcibly if we must." Vigorous addresses were made after the collation. Doubtless many were present merely as spectators, but they went away influenced by what they heard and influencing others by repeating it.

The success of this parade, meeting and speaking, led to a mass convention on Election Day at Newport. At this convention a State Committee was elected *viva voce* with instructions to work for an extension of the suffrage and a constitutional convention. Resolutions were adopted declaring that the charter had become insufficient and obsolete, and should no longer be permitted to subsist as a barrier against the rights and liberties of the people; that upon the occurrence of the Revolution the rights of sovereignty passed to the whole body of the people of the State and not to any special or favored portion thereof; that therefore the whole body became entitled to alter, amend or annul the form of govern-

ment, subject only to restrictions imposed by the constitution of the United States, and in their original and sovereign capacity, to devise and substitute such a constitution as they may deem to be best adapted to the general welfare; that no lapse of time could bar the sovereignty inherent in the people; that a system of government under which the legislative body exercises powers undefined and uncontrolled by fundamental laws, according to its own "especial grace, certain knowledge and mere motion" and which limits, restricts, makes and unmakes the people, at its own pleasure, is anti-republican, odious in character and operation, at war with the spirit of the age and repugnant to the feelings of every right-minded Rhode Island man, and ought to be abated. Disclaiming concerted action with any political party, these men pledged themselves individually to each other and collectively to the public, to use their unremitting exertions to procure a written constitution through a convention of delegates to be apportioned among the towns according to their population and to be elected by American citizens over the age of twenty-one years. To this end, they elected a State Committee to correspond with the towns, to obtain lists of all voters qualified as described, to call a convention and to prepare and send forth an address to the people of the State.

At the adjourned meeting of this mass convention held in Providence, July 5th, 1841, these Resolutions and plans were unanimously reaffirmed and endorsed,

and further statements of principles were made of the same import as those that had meanwhile been issued in June by the State Suffrage Committee, concluding with a short address to their fellow citizens, containing the ominous sentences,

Give us our rights or we will take them . . . Your rights are in your own hands. Assert and vindicate these, like men determined to be free. See to it that a meeting for the choice of delegates is held in every town, and that its proportional number is regularly elected. Summon your friends and neighbors to the work, and rely upon it that a constitution framed by such a convention will be promptly acquiesced in by the minority, will be vigorously sustained; and will become, without delay, the undisputed paramount law of our State.

Meanwhile what had been done by the old electorate, the landowners and their oldest sons and the regularly constituted authorities elected by them, to sustain the government?

Nothing whatever, in the way of organizing a reliable military force to guard against the use of force by the suffragists, should a conflict arise. There are two reasons for this supineness. The landholders, as a class together with the constituted authorities, looked down upon the suffragists with a mixture of contempt and tolerance, a feeling that it was just as well, in this land of freedom, to let them talk it out and that it would never amount to anything more than talk. To their surprise, the suffragists' arguments gained adherents, with the result that when an appeal to arms began to be talked about, it was found that the militia were divided in sentiment

and could not be depended upon to sustain the old government. No attempt, 'however, was made to create a new force, either of militia or constabulary or police, upon which the constituted authorities could depend, in case of trouble, and it was the absence of such a force that later led Governor King to appeal to the President of the United States for troops to sustain his tottering power.

The result of the election by the suffragists of the delegates to their convention to frame a constitution was unsatisfactory in one respect, inasmuch as it left it still in doubt whether their aims were in accord with the desire of the citizens of the state, but they were satisfactory in that they showed that it needed only further discussion to bring over a majority to their views. It was especially noteworthy that more than two-thirds of the eighteen delegates from Providence and probably more than half of all the delegates elected were freemen, that is, landholders, for only landholders and their oldest sons were freemen.

But what of Dorr during all this time? For we do not find him taking part in these movements since his famous address of 1834, until now we find him elected one of the delegates from Providence to the suffragists' convention to frame a constitution that met in Providence in October, 1841. We learn from the "Reminiscences of a Journalist," that interesting book written by Charles T. Congdon, at this time the editor of the suffragists' organ "The New Age"

something about the reasons for Dorr's temporary withdrawal from the controversy. Congdon was sent to urge him to take an active part in the movement again, and he tells us he found Dorr calmly smoking a cigar, with nothing about him indicating a revolutionist or a fanatic. Dorr said he had not been properly supported and curiously enough, it was to be this want of support that eventually brought him defeat. But he was induced to change his mind and being elected a delegate to the suffragists' Convention, he soon became its most prominent member. He delivered a carefully prepared address, when the convention had framed its constitution and had ordered it to be submitted to the vote of the people, that is to say, those who would become voters under its terms. This very able State paper by Dorr may be found *in extenso* in "Burke's Report,"<sup>3</sup> and should be read with care by every student of Dorr's career. In view of the opprobrium afterwards heaped upon Dorr and his followers for appealing to arms, it is well to remember that in this speech Dorr tells us that the so-called "Law and Order Party" were already making threats that they would call in the New York militia and United States troops to repress the suffragists. In reply Dorr said, "We throw out no boast of military preparation, and we make no such cowardly concession as that we stand in need of any foreign aid."

The constitution thus drawn by the suffragists'

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<sup>3</sup> Page 851.



Convention was submitted to the vote of the people December 27th, 28th, and 29th, 1841, each voter placing his name on the back of his ballot. The complete list of every person thus voting may be found in Burke's Report. The vote thus cast was found by the reconvened convention to prove the adoption of their Constitution, and it was accordingly resolved:

We do therefore resolve and declare that said Constitution rightfully ought to be, and is, the paramount law and Constitution of the State of Rhode Island and Providence Plantations. And we do further resolve and declare for ourselves and in behalf of the people whom we represent, that we will establish said Constitution and sustain and defend the same by all necessary means.

Does it not seem incredible that after such a declaration, following a course persisted in for months looking to the destruction of the existing form of government, not a single step had been taken by the constituted authorities to save their government from destruction? Is it to be wondered at that as the result of such indifference and supineness, the suffragists thought they were going to have everything their own way? This feeling was added to by the uncertain course of the delegates to the convention to frame a Constitution called by the General Assembly to meet November 1st, 1841. It met and adjourned in two weeks to February, leaving its work only partially finished, the delegates being uncertain what the people wanted and what the suffragists' or people's convention would do.

But evidently an impression had now been made that convinced many landholders of the injustice of the existing political system, with the result that the General Assembly, at the January session, 1842, passed an act providing:

That all persons now qualified to vote and those who may be qualified to vote under the existing laws, together with all persons who shall be qualified to vote under the provisions of the Constitution to be framed by the Convention authorized by the General Assembly, shall be qualified to vote upon the question of the adoption of said Constitution.

This was virtually a surrender to the claims of the suffragists and should have been at once accepted by them. But perhaps the concession was too long delayed, and the animosities engendered by what had been done were not to be so easily appeased.

The Convention authorized by the General Assembly completed its draft of a Constitution February 19th, 1842, and appointed March 21st, 22d and 23d as the days for the voters to approve or reject their work. This was nearly three months after the suffragists' Constitution had been declared by the voters to be the paramount law and the Constitution of the state. No preparation by the General Assembly was made to meet the impending conflict, the General Assembly contenting itself with mere words, unsupported by any preparation to support those words by force. They passed a series of Resolutions cautioning the good people of the state against being misled by the attempt to impose upon

them a Constitution not framed in accordance with law, concluding with the declaration "that this General Assembly will maintain its own proper authority and protect and defend the legal and constitutional rights of the people."

With all Rhode Island seething like a boiling pot, waiting for the next move by the suffragists under their Constitution which they had declared was the paramount law of the land, mere words by the General Assembly, in such a crisis but intensified the general feeling that the landholders were in the minority. This weak course and timid policy contributed to the defeat of the landholders' proposed Constitution, when it was voted upon March 21st, 22d and 23d, 1842, but only by a very narrow vote of 8013 yeas to 8689 noes. It was thus defeated by only 676 votes. If 340 who voted against it, had voted for it, it would have been adopted, and there would have been no Dorr war. It was defeated because the two extremes voted against it. The extreme conservative landholders voted against it because they wanted the control to remain in their hands and were therefore opposed to any extension of the suffrage. Many suffragists or Dorrites as they now were called, voted against it under the mistaken though sincere conviction that having secured the adoption of their own Constitution by their votes, they were not now at liberty to vote for another Constitution. It is impossible, however, in the cold impartial light of afterthought, to acquit Dorr and the leaders of his

party of the charge of want of sound judgment at this time. Had they vigorously counselled their followers to vote for this freemen's constitution, they could have secured its adoption. They would have come into control under its extension of the suffrage and then they could have made such further changes in the political system of the state as might be deemed by them to be necessary. It was at this point that the Dorrites were at the zenith of their power, but they knew not how to use their opportunity.

In this tangle and conflict of authority the Justices of the Supreme Court, Job Durfee, Levi Haile and William R. Staples felt called upon to state it as their opinion that, "the convention which formed the People's Constitution assembled without law; that the votes in favour of it were given without law; and however strong an expression of public opinion they might present, their constitution was not the paramount law of the land and was of no binding force whatever, and that any attempt to carry it into effect would be treason against the state if not against the United States."

To rebut this opinion, Dorr, with aid in securing citation of authorities, wrote an opinion and published it with the signatures of Samuel Y. Atwell, Joseph K. Angell, Thomas F. Carpenter, David Daniels, Thomas W. Dorr, Levi C. Eaton, John P. Knowles, Dutee J. Pearce and Aaron White, Jr., all lawyers, and which henceforth became known as "The Nine Lawyers' Opinion." It presented in able

form the principal arguments already briefly given above in favor of the legality of the suffragists' course, concluding:

We respectfully submit to you, fellow citizens, that the *People's Constitution* "is a republican form of government" as required by the constitution of the United States, and that the people of this State, in forming and voting for the same, proceeded without any defect of law and without violation of any law.

Three days after Chief-Justice Durfee delivered a carefully prepared charge to the grand jury of Bristol County that should be carefully studied. He reiterated in even stronger terms, the conclusion reached in the opinion that had been given by the members of the Supreme Court, giving warning that any attempt to carry the People's Constitution into effect by force would be levying war and therefore, treason.

Awakening at last, but at too late a period, to the danger of threatening the state and to the necessity of more stringent legislation to suppress the Dorr movement, in March, 1842, the General Assembly passed an act declaring illegal and void all meetings for the election of state officers not held in accordance with the laws of the state, forbidding anyone to act as an officer at such illegal meetings or to accept any office by virtue of such an election, with provision for punishment by long imprisonment for minor officers. The Act also provided that the higher officers should be regarded as guilty of trea-

son. The Act further provided that trials for the offenses specified might be held in any county, irrespective of the fact whether the offense was committed in that or in some other county. It was under this act, that Dorr was subsequently tried and convicted of treason. One of the newspapers having stated that the Dey of Algiers was lacking in power to enforce such a law, it became known, derisively, as the Algerine law, and those who stood for the Law and Order party were called "Algerines" by the Dorrites. This law induced many of the Dorrite nominees for office to decline, and a Committee of which Dorr was chairman, was elected to fill vacancies, etc. The other members of this Committee, Dorr not acting, now announced their state ticket, with Dorr at the head as Governor, and at the election held by his party, on April 18, 1842, Dorr and other state officers were unanimously elected.

It is impossible to account for the supineness of the constituted authorities in allowing these elections to take place, after the publication of the opinion of the members of the Supreme Court and the passage of the Algerine law, except upon the supposition that as the General Assembly had passed no act to enable the Governor to call out the militia, and as the Governor had no real authority, none being given to him by the Charter of 1663, he did not feel authorized to do so. It seems certain that this failure to take any step to suppress the Dorrite movement, but encouraged the Dorrites to go on in their

course. In addition, both sides well knew that the militia could not be relied upon, in an emergency.

Two days later the regular election under the charter came off, and Samuel Ward King was elected Governor.

Nearly two hundred members of the Dorrite party, elected to office, were now liable to arrest and conviction for treason, yet there was no attempt at arrest, neither was any attempt made to prevent their induction into office. Two rival Governors and two rival General Assemblies confronted each other. Which side was to be victorious?

The charter government authorities now made another great mistake. They appealed to President Tyler for United States troops to do what they had not even attempted to do—to suppress the Dorrites. This step but embittered the Dorrites, and it failed to secure the help desired. Again and again was the appeal made, but the President had good advisers about him, and continuing to recognize the existing government as a government *de facto*, he declined sending troops, unless called upon to do so by actual insurrection. He kept his head and was undoubtedly right.

The possibility of armed conflict was becoming apparent and as usual, in troublous times, the most absurd rumors obtained credence. It was said that the Dorrites would sack and loot the city, their object being beauty and booty; that they would fire red hot balls and thus set fire to the town. Families

were divided and animosities were engendered that have still left their traces.

On May 3d, 1842, Dorr was inaugurated Governor at the first and only meeting of his legislature. A procession of perhaps two thousand persons, including some militia companies and an independent company, some of whom were armed, preceded by the usual brass band, escorted the Governor elect and the members of the General Assembly elect, to a new, unoccupied foundry building, whence this became known as the "Foundry Legislature." The sheriff at the State House, that was also the Court House with the records of the Supreme Court and where this Court also met, was prepared to give up possession, having indeed no means furnished him to maintain possession. It was Dorr's purpose to march there and take possession, but he was overruled, and the psychological, opportune moment was lost. The almost incredible folly was made of electing as Justices of the Supreme Court the same Judges already in office who had given their opinions that what Dorr was now doing was treason! These two mistakes were enough to lose the day and the opportunity. Possession of the State House and Court House, with the State and Court records at once in the custody of a new clerk, with new judges carrying on the regular judicial business of the state, with Dorr and his General Assembly duly sworn and inaugurated and supported by such adequate armed force as were present on that day, would have started



into life a new government *de facto* under a good claim of right, that might easily have been enough to put an end to the charter government. While Dorr, inside the foundry, was being sworn in, and was delivering his inaugural message, the military escort outside was holding a meeting in which they resolved that as a component part of the militia of the state they would obey all lawful orders coming from Thomas Wilson Dorr as commander-in-chief under the Constitution. Perhaps Dorr could not deliver his inaugural message and order this force to take command of the State House at the same time, but where was the trusty lieutenant to act at the opportune moment and to order a march to the State House to take possession? With none to oppose and without shedding one drop of blood, Dorr's government would have become at once both a government *de facto et de jure*. What other colonies did in 1776, would now have been done here in 1842.

Dorr's inaugural message, like all his political papers, shows the ability of the man, and should be read by every student of Rhode Island history. One point is of importance. Admitting that the moderators at the meetings held upon the adoption of the People's Convention were not under oath, he said that neither were those of the Freemen's meetings, except in the city of Providence. This safeguard against fraud had not then been generally adopted. The objection frequently advanced, that the voting under the suffragists' meetings was not thus protected

and therefore was not as reliably done as the voting at the meetings of the charter authorities (except in the city of Providence) cannot be sustained.

The charter General Assembly met the next day, May 4th, 1842, in Newport, and continued the weak, vacillating policy already pursued, requesting the Governor to invoke the President's aid, but taking no steps itself to guard against insurrection. How could the support of the national government be expected to protect a state government that took no steps to protect itself? But it led Dorr to the mistake of going at once to Washington, to counteract this appeal, and to secure the same aid for his own cause. Meeting with no success, he returned to New York, despondent and hopeless. Here an attempt of the Democratic organization to ally the Dorr movement in Rhode Island with the Democratic party, led to public meetings at which Dorr spoke and allowed himself to be misled by promises of aid and support from New York companies of militia. Meanwhile his absence had led to a rumor that he had run away. Taking courage, the charter authorities issued warrants for the arrest of Dorr and his leaders, many of which were served. The Providence Journal of May 17th, 1842, said:

The revolution is in a state of suspended animation. Governor Dorr has hid or run away. Pearce is missing. Sheriff Anthony has absquatulated. The Secretary of State's office is over the line and their headquarters, nobody knows of. Their General Assembly has evaporated.

Telegraphs were not then in use, else the Journal would have known that on the preceding day Dorr had returned from New York to Stonington by steamboat, and had issued a proclamation to his fellow citizens in Rhode Island announcing his intention of calling for the aid offered him in New York "so soon as a soldier of the United States shall be set in motion, by whatever direction, to act against the people of this State, in aid of the charter government."

In this proclamation he said:

No further arrests under the law of pains and penalties (the so-called "Algerine law") which was repealed by the General Assembly of the people at their May session, will be permitted. I hereby direct the military, under their respective officers, promptly to prevent the same, and to release all who may be arrested under said law. As requested by the General Assembly, I enjoin upon the militia forthwith to elect their company officers; and I call upon volunteers to organize themselves without delay. The military are directed to hold themselves in readiness for immediate service.

Only overweening confidence and faith in the absolute justice and final success of his cause can account for such language, coming from one with nothing but moral force behind him.

A crowd met Dorr upon his return by railroad to Providence. A procession, of which armed militia volunteers formed part, escorted him to his temporary headquarters. Dorr made an address standing in his carriage. It was declared by the Providence Express, which was favorable to his cause, to be "well-timed and eloquent." It was declared by the

Providence Journal, which was unfavorable to his cause, to be "furious and inflammatory." Unfortunately no shorthand reporter took it down. The testimony of witnesses varied afterwards, at his trial for treason, as to whether he brandished a sword while making this address, a "sword dyed in blood," which he was ready to use again in the people's cause.

The next day Dorr made the fatal mistake of appealing to arms, by an attack upon the arsenal, to obtain possession of the guns and military supplies stored there. But unknown to him, a detachment of militia were inside, and among its officers was Samuel Ames, who had married Dorr's sister. The night was warm, very dark and foggy. Everyone lost everyone and it is impossible to make out exactly what did take place. There was an attempt to fire a cannon against the arsenal and some witnesses testified, at Dorr's trial for treason, that Dorr himself made the attempt, but this was denied by other witnesses. The cannon would not go off because a pailful of water had been poured into it. The attack failed. Dorr's force dispersed, and by morning Dorr drove out of the city and left the state, barely escaping arrest.

The charter General Assembly met May 20th at Newport and after discussion, decided to call another constitutional convention. Taking warning from past failures and learning at last that the demand for an enlarged electorate must be met, it was

provided that the delegates to this convention were to be elected by the votes of those already qualified to vote for general officers, and also of all native male citizens of the United States, twenty-one years or more of age (except Indians, convicts, paupers, etc.). It was further provided that in voting upon the adoption or rejection of the new constitution, in addition, to the existing electorate, all those should be admitted to vote who would afterwards become voters under its terms.

Here was a virtual surrender to the suffragists' demand and had Dorr and his followers been wise they would now have sought amnesty for the past and would have confined their further conflict to the use of ballots at the polls. But this was not to be, and the constitution framed by this convention, although far from perfect, was adopted without the aid of the Dorrites, and is still the constitution of Rhode Island.

Leaving the state, Dorr went to New York and thence to Norwich, Conn. Being informed that his followers were gathering at Chepachet, in Gloucester, R. I., Dorr joined them June 25th. To his surprise and disappointment, he found only a slight breast-work thrown up on Acote's Hill and about one hundred and forty men in arms with no commissariat. Now, at last Governor King declared martial law and called out the militia of the state. To the number of more than four thousand they assembled at Providence and marched and countermarched.

Then a portion was sent to Foster and an advance guard was cautiously despatched to Greenville, about half way to Chepachet. The insignificant undrilled handful of volunteers at Acote's Hill gradually melted away and calling a council, Dorr and his officers decided to disband. The decision was made known to the men between six and seven o'clock on the afternoon of June 27th and was at once carried into effect, Dorr sending letters to Providence for publication, announcing the fact of disbandment, and immediately leaving the state, to escape arrest. His letters to Providence were captured, taken to the Governor and opened and read at about the same hour Dorr's force was dispersing at Chepachet. Instead of publishing at once the information they contained, it was concealed, and the militia were ordered to march to Chepachet.

What is to be thought of constituted authorities who ordered their raw militia to make a night march under the supposition that they were to attack an armed force behind intrenchments, knowing at the time that the enemy had already dispersed, withholding this information from the public until the next day? To keep up the fraud or the farce, the Providence Journal issued an extra edition on the afternoon of June 28th, with this intelligence:

Dorr Fled and his Fort Taken.

News has this moment arrived that the force under the command of Colonel Brown has taken the insurgent fortification. Dorr has fled but large numbers of his men have been captured.

And the government issued the following:

Orders No. 54. Headquarters, etc., June 28th, 1842.

The village of Chepachet and fort of the insurgents were stormed at quarter before eight o'clock this morning and taken, with about one hundred prisoners, by Colonel William W. Brown; none were killed and no one wounded.

And thus ended the Dorr War! But one man lost his life, a Massachusetts man on Massachusetts soil, who was killed accidentally by a musket ball fired across the bridge at Pawtucket.

The success of the charter government in ending the Dorr movement has caused forgetfulness of the inefficiency and political incapacity of the constituted authorities.

On June 29th Governor King issued a proclamation offering, in addition to one thousand dollars already offered, the further sum of four thousand dollars "for the apprehension and delivery of the said Thomas Wilson Dorr to the sheriff of the county of Newport or Providence within three months from the date hereof."

Dorr had gone to New Hampshire where he remained more than a year under the protection offered by the refusal of the Governor to honor a requisition for his extradition.

In August, 1843, Dorr issued a masterly address to the people of Rhode Island, reviewing the whole controversy, with the reasons for his course, and announcing his intention of returning to Rhode Island. Accordingly, acting under a sense of duty, knowing

that he would be arrested and tried for treason under the indictment of August 25th, 1842, Dorr quietly returned to Providence, October 31st, 1843, was immediately arrested, and kept in the jail in Providence until February, 1844, when he was taken to Newport for trial there. This in itself was a violation of the usual rule of law requiring trial for a criminal offense in the county where the offense was committed, in order that the accused may be tried by a jury of the vicinage. Dorr's offenses had all been committed in Providence county and there he had many supporters. It would therefore be difficult to secure a jury in that county from which all persons of his way of thinking would be excluded, whereas in Newport county Dorr had but few adherents. The so-called Algerine law permitted such a trial in another county than the one in which the offense was committed, and for the reasons stated, the trial came off in Newport. It presents the unique feature of a trial by the court of a state under a new constitution, for treason committed against a form of government that had now gone out of existence. We are accustomed to study the records of the English State Trials as full of tragic interest, and as faithful pictures of the development of law and of civilization. In the two good Reports by Turner and by Pitman of Dorr's trial for treason, we have a record as full of interest and of value as any English State Trial; one that will be studied more in the future than it is now.



The court that tried Dorr consisted of the same three judges who had given their opinion against the legality of the Dorrite movement, and Judge Brayton who was since then added to the court. One hundred and eighteen summoned jurors were examined before twelve were obtained for the jury, and but three of the one hundred and eighteen belonged to the Democratic party, now considered the Dorr party. There was not a Dorrite on the jury, a result that can hardly be considered to be accidental. The Attorney-General proposed to put these questions (among others) to the several jurors on the panel, as their names were called:

3d. Did you vote for the said Thomas Wilson Dorr for governor at the election on the 18th of April, 1842?

4th. Have you formed the opinion, or do you believe that said Thomas Wilson Dorr was the governor of this state, or authorized to exercise the duties of governor at any time between the 16th day of May, 1842, and the 28th day of June, 1842?

As well might Dorr and his counsel have put the same questions, substituting the appropriate changes in date and the name of the charter governor, Samuel Ward King. The questions were of course objected to and after argument on both sides and due deliberation, the court was evenly divided, and the questions were not put. The surprising thing is that the court did not unanimously exclude the questions, as clearly unreasonable and improper. To admit them, and as a necessary consequence, to admit similar questions on the part of the defense, and to ex-

clude from the jury all who had voted for Dorr or for King, would have resulted in putting an end to any trial.

Dorr made no attempt to deny the main facts; on the contrary, he diligently sought to have them made fully known to the jury. When a witness friendly to Dorr claimed that a conversation he had with Dorr was private and confidential, Dorr said, "I release you from all the honorary obligation which you regard yourself as being under that you may relate all you know." When another friend, a Dorrite, was under examination as a witness against him, Dorr said: "he hoped Mr. Salisbury would not withhold anything he knew, on his account." So far did Dorr carry this, that the Chief-Justice was led to remark sarcastically that the object of the cross-examination thus far seemed to have been to establish the charges in the indictment, by proving the particulars instead of denying them, to which Dorr replied he hoped that the privilege would not be refused him of getting at the facts as they were, even if they should be against him, in the opinion of the court.

The defense presented by Dorr, after disposing of defenses in bar of the suit, was that of justification. There were four counts in the indictment, two for acts of treason committed at Providence, May 17th and 18th, 1842; the other two for acts of treason committed at Gloucester, June 26th and 27th, 1842. The specific acts of levying war, constituting treason, on these four specific days, not being laid with a

*continuando*, it is difficult to understand why testimony concerning similar acts on other days was allowed to go to the jury without objection by Dorr's counsel, even though we know that Dorr himself wanted all the testimony as to his acts to be put in. It has been claimed, by those who defend the government's conduct of the case, that evidence concerning similar acts on other days was properly allowed, because tending to show Dorr's intentions or motives. But the argument goes too far, for if the intention or motive is allowed to be shown by the prosecution, it opens the door for the defendant to rebut it with evidence of other intention than that claimed by the prosecution, to show that his intention or motive was good and not bad as was claimed by the prosecution; that he was seeking to promote the welfare of the state by supporting what he and his followers claimed was the true government, and hence, that his intentions were not traitorous.<sup>4</sup>

In opening the defense, Turner, for the accused, stated five principal points:

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<sup>4</sup> Thus we learn from Turner's Reports of the trial, p. 10, that the counsel assisting the prosecution "Mr. Bosworth, then went on to give a history of the proceedings of the defendant and to describe his motives and character in an exaggerated strain of denunciation and invective, more adapted to the political caucus than to the hall of justice, and which a political opponent should hesitate to employ. Mr. B. had forgotten the remark of his colleague, the Attorney-General, 'that if Mr. Dorr were governor, then he had a right to do all that he did,' and that the true question involved the principle of popular sovereignty, which might be honestly supported by Mr. Dorr, as it had been by the men of former days, who have bequeathed to us the inheritance of our liberties."

1. That treason cannot be committed against a state, but only against the United States.

2. That the Act of March, 1842 (the Algerine law) "is unconstitutional and void, as destructive of the common law right of trial by jury, which was a fundamental part of the English constitution at the declaration of independence, and has ever since been fundamental law in Rhode Island."

3. That the act, if constitutional, gives this court no jurisdiction to try this indictment in the county of Newport, all the overt acts being therein charged as committed in the county of Providence.

4. That the defendant acted justifiably as governor of the state, under a valid constitution rightfully adopted, which he had sworn to support.

5. That the evidence does not support the charge of treasonable and criminal intent in the defendant.

The court easily and very properly decided that treason can be committed against a state, as well as against the United States, though the decision was only made after full argument with elaborate citation of authorities by the defendant and his counsel.

As to the second point (that the Algerine law was unconstitutional and void, because destructive of the common law right to jury trial), Dorr's counsel would seem to have been oblivious of the fact that such a claim would place a limitation upon the power of the General Assembly under the charter, and that this was inconsistent with the stand Dorr had taken that there was no limitation upon the power of the General Assembly and that a written constitution was necessary because only in this way could the

people place limitations upon the powers of the General Assembly.<sup>5</sup>

This omnipotent power of the General Assembly in the old days of the charter government, was once well described by a member in the course of a legislative debate, as follows: "Mr. Speaker, the member from —— is very much mistaken when he supposes that this General Assembly can do anything that is unconstitutional. Sir, I conceive that this body has the same power over the non-freeholders of this State that the Almighty has over the universe." It will not do to blow hot and to blow cold with the same argument. One of the reasons why a written constitution was needed in Rhode Island, was that there was no limitation on the power of the General Assembly. But the Algerine law was passed by just this General Assembly that had this unlimited power. Therefore it was not logically open for Dorr to contend that it had no power to pass this law. It follows that the law in question being valid (unless, when the law was passed, Dorr's government was the true government of the state), the court had jurisdiction to try the indictment in a county other than the one in which the offense was committed.

The point might have been raised that the government now existing under the provisions of a newly written constitution, restricting the power of the General Assembly and creating a Supreme Court and a judicial system under it different from what

had before existed, had no power to try the defendant for treason alleged to have been committed against another government that had now gone out of existence, under a law, which, even though it might have been valid under that government, because, being without a written constitution, whatever law it enacted was valid, the present General Assembly confessedly had no power to enact. But the point was not raised.

The fourth point of the defense, that Dorr acted justifiably as governor of the state under a valid constitution rightfully adopted, which he had sworn to support, was better taken, especially in view of the indiscreet language used by the prosecution without check by the court, and the evidence for the prosecution that was allowed to go to the jury as to the bad motives or intentions of the defendant. Dorr offered evidence to prove that a large majority of the whole male adult population of the state, citizens of the United States, had voted for the People's Constitution in December, 1841, and that under the constitution thus adopted, he had been elected governor. He offered to produce the ballots themselves and the men who cast them, but the evidence was refused by the court. In his charge to the jury, Chief-Justice Durfee said:

Courts and juries, gentlemen, do not count votes to determine whether a constitution has been adopted, or a governor elected or not. Courts take notice without proof offered from the bar,

what the Constitution is, or was, and who is, or was, the Governor of their own State. It belongs to the Legislature to exercise this high duty.

This is undoubtedly sound law well put, but nevertheless the evidence might have been admitted "for the purpose of explaining the motives of the prisoner" and to rebut the testimony as to his bad motives, that had been allowed to go to the jury. Dorr claimed that he had the right to show that he had not risen in the midst of the people as a usurper, but was endeavoring to secure to them rights of which they were unjustly deprived, and hence, that his motives were not traitorous.

It is certainly proper to claim a right to repel the charge of wicked and malicious motives in exercising a pretended authority, which has been so much dwelt upon by the prosecution, in the opening of the case.

MR. TURNER:—Will the Court have the goodness to state why testimony as to the "fiendish looks" and expressions of the defendant was allowed to be gone into? The opening counsel has indulged himself in harsh imputations against the defendant; and a great many things have been introduced here which can have no other effect than to prejudice the jury against him. We ought to be permitted to remove all these prejudices, as we can if we be permitted to go into the whole case.

Again, later, an effort was made to put in this testimony. Dorr said:

I have sought to conceal nothing in this case. . . . Levying war is not enough. In the language of Chief-Justice Marshall, the levying war must be with the intent to commit treason; and treason is not to be inferred from an assemblage in arms

without an examination of all the circumstances and reasons that led to it.

But again the offer was overruled and again the defendant took his exceptions.

The result was a foregone conclusion. Upon the evidence, the admissions made by the defendant, the exclusion of the testimony of the defendant above described, and with the jury made up as it was, exclusively of anti-Dorrites, notwithstanding the able and eloquent address made by Dorr, there could be but one result. The jury agreed at once upon a verdict of guilty. A bill of exceptions based upon eighteen objections or exceptions taken during the trial, was presented to the court by Dorr's counsel, and also a motion for a new trial. The exceptions were all overruled and the motion for a new trial was denied, after full hearing and argument, with citation of authorities. A motion was then made and argued in arrest of judgment, and this also was overruled. The Attorney-General moved at once for sentence. The next morning, June 25th, 1844, Dorr was asked if he had anything to say why sentence should not now be pronounced against him. He replied:

Without seeking to bring myself in controversy with the court, I am desirous to declare to you the plain truth. I am bound, in duty to myself, to declare to you my deep and solemn conviction that I have not received, at your hands, the fair trial by an impartial jury, to which by law and justice, I was entitled.



After giving briefly his reasons for reaching this conclusion, he said:

All these proceedings will be reconsidered by that ultimate tribunal of Public Opinion, whose righteous decision will reverse all the wrongs which may be now committed, and place that estimate upon my actions to which they may be fairly entitled. The process of this court does not reach the man within. The court cannot shake the convictions of the mind, nor the fixed purpose which is sustained by integrity of heart.

Claiming no exemption from the infirmities which beset us all, and which may attend us in the prosecution of the most important enterprises, and at the same time conscious of the rectitude of my intentions, and of having acted from good motives, in an attempt to promote the equality and to establish the just freedom and interests of my fellow-citizens, I can regard with equanimity this last infliction of the court; nor would I, even at this extremity of the law, in view of the opinions which you entertain, and of the sentiments by which you are animated, exchange the place of a prisoner at the bar for a seat by your side upon the bench.

The sentence which you will pronounce, to the extent of the power and influence which this court can exert, is a condemnation of the doctrines of '76 and a reversal of the great principles which sustain and give vitality to our democratic Republic and which are regarded by the great body of our fellow-citizens as a portion of the birthright of a free people. From this sentence of the court, I appeal to the people of our state and of our country. They shall decide between us. I commit myself without distrust to their final award. I have nothing more to say.

The sentence of the court was then announced by Chief-Justice Durfee as follows:

That the said Thomas W. Dorr be imprisoned in the State's Prison in Providence in the county of Providence, for the term

of his natural life, and there kept at hard labor in separate confinement.

On Thursday afternoon, June 27th, 1844, Dorr was removed from the county jail in Newport and was committed to the State's Prison in Providence there to undergo the sentence of the court.

Upon a dispassionate review of the case, it is impossible to avoid the conclusion that this sentence was unduly severe. The dignity of the law and the peace of the state would have been asserted and maintained had the court, taking into consideration facts well known to its members, both personally and judicially, sentenced Dorr to solitary confinement for twenty-four hours. Personally, of course, every member of the court knew Dorr, who and what he was, and what his motives were. They knew he was, and long had been, a lawyer of high character and reputation, of exemplary life, of good family and for years a trusted representative in the General Assembly from Providence, a bank commissioner, and one who had filled other positions of trust and responsibility. But putting aside their personal knowledge, they had also the knowledge that they as well as the jury derived from the evidence in the case submitted by both sides. Walter S. Burgess, Dorr's life-long friend, an honored citizen, who accompanied Dorr to his prison cell, and who took him from it, upon his release, a year later; afterwards Dorr's literary executor, and for many years a member of the Supreme Court, testified at the trial that on the even-

ing of May 17th, the night of the attack on the Arsenal, he called upon Dorr, and during the interview, Dorr asked him, in case of accident to himself, to attend to his affairs. Dorr directed him where to find the books and papers in his hands as one of the State Commissioners of the Scituate Bank: also the files of papers pertaining to his office of President of the School Committee of the City of Providence which he had filled for some time: also the papers, securities and funds belonging to the Rhode Island Historical Society, of which he was Treasurer. He also told him particularly where he would find other valuable papers relating to the administration and guardianship accounts in his hands.

Then, too, a member of the court that tried Dorr was at the time President of the Historical Society of which Dorr had been President, and in many other ways the members of the court had taken part with Dorr in positions and duties in public as well as in private life. Other instances of knowledge of the same kind that reached the judges as well as the jury during the trial may be found in the accounts of the trial. In excluding some of the testimony offered, the court intimated more than once that it would have its influence with the Court after verdict and before sentence. As the Court imposed the greatest penalty it could, it is evident they did not give to it that weight it was entitled to. The judges well knew that the real essence of trea-

son was lacking, that Dorr's motives were of the highest character, that he desired the good of all the people and that there was no intention on his part to subvert the state and enslave the people by making himself supreme ruler outside of the limitations of law. On the contrary, the judges well knew that Dorr was endeavoring to establish a real republican form of government under the limitations of a written constitution. He strove to bring about in reality what we had only in pretense,—a republican form of government. We had the *form* but not the *essence*. Dorr's talents and energies were directed to giving the state both the form and the essence. The judges should have taken all this into due consideration in determining their sentence. This was not done, and the result was a barbarous sentence,—a blot upon the administration of justice in this state. This deliberate judgment is not intended as a personal reflection upon the members of the court, two of whom were kinsmen of the writer. They all did their duty as they saw it before them, but it is deplorable they did not see it in a broader light, as did our great national leaders, twenty years later, in the crisis of the Civil War.

To sentence such a man as Dorr, under such circumstances, to imprisonment for life at hard labor, in separate confinement, was barbarous and cruel, especially when, as the judges well knew, a minority of his fellow-citizens large enough to make it doubtful whether they did not constitute a majority, be-

lieved as Dorr did, and had so far prevailed that at last the landholders had been brought to abandon their original contention that they and their oldest sons were the only citizens of the state who had the right to determine what the form of government should be, and who should be admitted to the suffrage. We cannot escape the conclusion that the judges erred in not taking all these matters into due consideration in determining the sentence. Upon the evidence and the law, the jury did right in finding the prisoner guilty. Upon the evidence and the law, the court did wrong in inflicting such a severe sentence.

Unaccustomed as we are now to such severity, it is difficult for us to appreciate it, even if carried out in mitigated form. A gentleman now living has told us of a visit made by him when a child, with his father, an old friend of Dorr's, upon Dorr while in prison. They stopped at the door of a cell, in which Dorr, alone, was at work, painting some particular part of fans, the mitigated form of "hard labor," he was compelled to perform, through the leniency of the prison authorities. Dorr looked up from his work, and recognizing in the boy's father his old friend and political supporter, he bowed. His visitor bowed in return, but neither spoke.

In what respects was Dorr right and in what wrong? In general, it may be said that he was right in endeavoring to bring about political re-

forms in Rhode Island, and he was right as to the reforms that were needed, but he was wrong when he attempted to use force to carry those reforms into effect. Still further he was wrong in attempting to use force at the particular times he made the attempts. He missed the psychological moment when he failed to take possession of the State House and the State and Court records on the day he was inaugurated as Governor under the Constitution. He erred in judgment when he went to Washington to invoke assistance there. He erred worst of all when his overmastering sense of logic prevented his advising his followers to take part in the formation of a new Constitution, the delegates to which and the voters upon which, were not restricted to landholders and their oldest sons. He erred again when he stopped and spoke at political meetings in New York and allowed himself to be cajoled into believing he would receive support from that quarter. He erred in attempting an attack on the arsenal and again in attempting to organize an armed force at Chepachet. He erred in returning to the state to stand trial for treason, for he knew that the judges who would try him were, with the addition of one more judge, the same judges who had given their opinion against the validity of his course and of the principles he advocated. No government ever convicts itself of having no right of being and the acquittal of Dorr would have meant the conviction of illegality of the government that tried him.

Dorr erred therefore greatly in good judgment when he submitted himself to the jurisdiction of this court. Let us frankly admit his faults but let us with equal frankness admit his claims to distinction, let us unite "in according to him a conscientious and commendable purpose and in honoring his memory as a reformer whose efforts extended the rights of suffrage to all the native citizens of the state." This is the language of Judge Stiness in his Memorial Address on W. S. Burgess, read before the Rhode Island Veteran Citizens Historical Association, November 14th, 1892. Although Dorr was personally defeated and crushed, he was substantially successful in accomplishing the result for which he strove.

His political opponent, the editor of the Providence Journal, in its issue of May 24th, 1842, said:

Dorr was a man endowed with intellectual powers, which, had they been properly directed, would have always secured him a commanding influence. Those powers, too, were disciplined by an education more accomplished, perhaps, than any other man of his age in Providence had been privileged to obtain. As a man of science and letters he might have attained honorable distinction, had he chosen to dedicate his time either to science or to letters. As a statesman, he might have rendered his native state substantial service. He might have been a true-hearted private gentleman, honored by the respect and confidence of the community in which he resided.

Such was the opinion of his political opponent, afterwards for many years a United States senator from this state. But he failed to perceive that as a political reformer, although personally defeated and

crushed, Dorr *has* "rendered his state substantial service" through the adoption of a written constitution embodying in part his principles. These principles have not yet received their full application. But we may add that they are destined to be more perfectly appreciated and applied by the State in the future.

The result of the severity of the sentence inflicted upon Dorr was what might have been expected. A reaction set in and much sympathy was expressed for the "Martyr Governor." Unknown to him, his aged parents applied to the General Assembly for his release from prison under an act of amnesty. An act was passed releasing him from imprisonment with the proviso that he should take an oath of allegiance to the state. True as always to his own sense of duty, Dorr declined to take the oath required, declaring that to do so would be a recognition on his part that he had heretofore failed in allegiance, and this he could not admit. Therefore he preferred to remain in prison.

This but increased the agitation for his unconditional release and the subject became the leading political issue in the state. The following spring, 1845, the "Liberation" candidate for Governor, Charles Jackson, was elected and the "Liberationists" had a majority in the General Assembly. Dorr was released unconditionally under an act of the General Assembly in June, 1845, having remained in prison one year. He came out a disappointed, broken-



hearted man. Although a physical wreck, his resolution was undaunted. His rheumatic affection had been increased by the dampness of his stone cell in prison, and he also had some obscure affection of the stomach that kept him an invalid at home during the nine remaining years of his life.

The sympathy excited by his condition, with a sense of recognition of the value of Dorr's work as a political reformer, led to the passage, shortly before Dorr's death, of the following extraordinary act of the General Assembly of June 25th, 1854: "Reversing and annulling the judgment of the Supreme Court of Rhode Island for treason rendered against Thomas W. Dorr."

Section 1. The judgment of the Supreme Court, whereby Thomas Wilson Dorr, of Providence, on the twenty-fifth day of June, A. D. 1844, was sentenced to imprisonment for life, at hard labor, in separate confinement, is hereby repealed, reversed, annulled and declared in all respects to be as if it had never been rendered.

Section 2. To the end that right be done to the said Thomas Wilson Dorr, the clerk of the Supreme Court for the County of Newport, is hereby directed to write across the face of the record of said judgment, the words "Reversed and annulled by order of the General Assembly, at their January session, A. D. 1854."

Section 3. The Secretary of State is hereby directed to transmit a copy of this act to each of the Governors of the several states and to the Congress of the United States.

Acts like these, passed by the Parliament of England or by the General Assembly of Rhode Island

during the interval after the Declaration of the Independence of the state and until the adoption of a written constitution, may be supported on the ground that Parliament and General Assembly were, respectively, the sovereign power. When Parliament repealed the Triennial Act under which its members had been elected, enacted a Septennial Act, and then continued its own existence until the end of seven years, although Lord Campbell expressed doubts of the constitutionality of the Act, there was no power anywhere to declare it invalid and so it was constitutional in the sense that it took effect and no power could overrule it. But this act, reversing the judgment in Dorr's case, was plainly unconstitutional, because it was passed by a General Assembly that, under the written constitution then in force, had no such power. And the members of the Supreme Court gave their opinions to that effect June 14th, 1854.<sup>6</sup> Durfee had died since the trial of Dorr and R. W. Greene had taken his place as Chief-Justice, the other members of the court remaining the same, Haile, Staples and Brayton.

But looked at from another point of view, even granting that the General Assembly of Rhode Island, like the Parliament of England, had no limitations upon its powers, there are other good and sufficient reasons that show this Act, reversing the judgment in Dorr's case, to have been a mere nullity. One is the rule of parliamentary law laid down by

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<sup>6</sup> *In re Dorr*, 3 Rhode Island Reports, 299.

Cushing, that one body has no control over the records of another body. As well might one Church Council attempt to change the record of some other Church Council. Another reason is that not even an omnipotent General Assembly can make that not to be that is. Parliament, for instance, might resolve that the sun did not rise yesterday, but with all its omnipotence the fact is beyond annulment that the sun did rise yesterday. So in this instance the General Assembly of Rhode Island, even were there no restriction upon its omnipotence, cannot annul the fact that the Supreme Court did sentence Dorr to imprisonment for life at hard labor in separate confinement.

But to the dying man this attempted annulment of the decree against him brought small comfort. Upon his conviction, he had appealed to the people of our state and of our country. The appeal was not in vain. As the animosities of the conflict fade from sight, we appreciate in spite of the mistakes in judgment he sometimes made, that high upon the role of Rhode Island's great men will stand forever the name of the political reformer and public benefactor, Thomas Wilson Dorr.

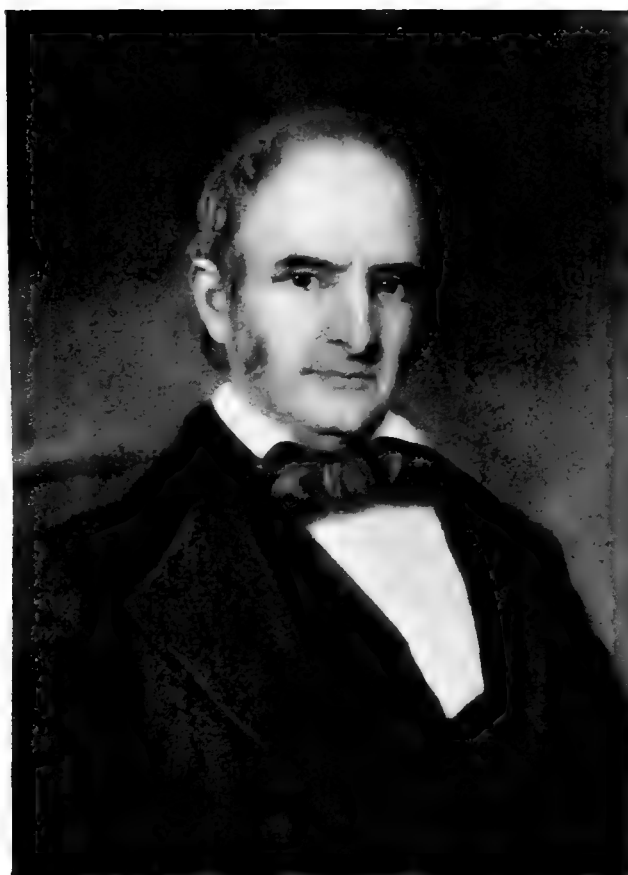
RICHMOND MUNFORD  
PEARSON.



**RICHMOND MUNFORD PEARSON**

From a painting by Carl Brown, executed in 1857, in possession of Judge Pearson's son, the Honorable Richmond Pearson, of Asheville, North Carolina.









# RICHMOND MUNFORD PEARSON.

1805-1878.

BY

JETER CONNELLY PRITCHARD,

*United States Circuit Judge, Fourth Circuit.*

**R**ICHMOND Munford Pearson was born at Richmond Hill, then Rowan and now Yadkin County, North Carolina, on the 28th day of June, 1805. He was the son of Richmond Pearson, who married Miss McLin. His father was never in public life but was a man of great intellectual force and an enterprising citizen.

Judge Pearson was descended from Revolutionary stock. His ancestors bore a leading part in that memorable conflict. When the War of the Revolution broke out Judge Pearson's grandfather, Richmond Pearson, was a Lieutenant in Captain Bryan's Company (afterwards the celebrated Colonel Bryan of Tory memory). Bryan at that time was very much in sympathy with the loyalists and had no doubt made up his mind to join their forces at the first opportune moment. At the first meeting after the Declaration of Independence, he requested the members of the company who were in sympathy with him and upon whom he could rely, to load

their guns with a view of forcing all the members of the company to fight against the colonists. When Captain Bryan arrived at the muster ground, in pursuance of his scheme he ordered all the men into ranks. Pearson refused to obey orders and tendered his resignation to Bryan; whereupon Captain Bryan ordered him under arrest. Pearson resisted, but he was informed that the men had their guns loaded, and after considering the matter they came to an understanding. It was agreed by those present that Bryan and Pearson on a fixed day should settle this "national affair" by a fair fist fight, and whoever whipped, the company should belong to the side of the conqueror,—Whig or Tory. In pursuance of this agreement the parties met, and after a desperate struggle Pearson proved to be victor. From this time the "Fork Company" (as it was known), was for liberty, and Bryan's crowd on Dutchman's Creek were loyalists. When Cornwallis came south, Pearson with his company impeded the advance in every possible way. He was present at the Battle of Cowan's Ford in 1781, where General Davidson fell in attempting to prevent the passage of the British. Bryan became a colonel in the Tory regiment, which was literally cut to pieces by Colonel Davidson and his men at the battle of Hanging Rock. About the time Major Craig evacuated Wilmington in 1781, Colonel Bryan, Lieutenant John Hampton and Captain Nicolas White of the same regiment, returned to the forks of the Yadkin, and were arrested and

placed on trial for treason. Judges Williams and Spencer presided. They were ably defended by Richard Henderson, John Penn, John Kincher, and William R. Davie, and the prosecution was conducted by the Attorney-General, Alfred Moore. The trial resulted in the conviction of all the parties and the sentence of death was passed upon them. However, they were subsequently pardoned and exchanged for officers of equal rank who were fighting in the British lines.

There being no schools in the immediate community in which young Pearson resided at the time he had reached the school age, he was sent to a preparatory school at Statesville, North Carolina, taught by John Mushat, one of the ablest and most successful teachers of that day. Under the supervision of his uncle, who was a man of distinction, he entered the University of North Carolina at the age of fifteen, and was graduated with highest honors in 1823, being valedictorian of his class. He then read law under Judge Leonard Henderson, of Granville County, and after obtaining a license settled at Mocksville, Davie County, for the practice of his profession.

He was at the head of a private law school for forty years, and was at once principal and faculty. This school was conducted at his residence at Richmond Hill in Yadkin County, and his students boarded with him. He was ardently in love with his work and gave it the best years of his life and for

it made thorough preparation. So thoroughly had he mastered the principles of the law and so familiar was he with the old writers that I am informed by a member of his family he never during all that time opened a book in the class-room, and his powerful memory retained every detail, even the side-pages or margins where a given doctrine could be found.

In 1830 he married Marguerite McClung Williams, daughter of Colonel John Williams, of Knoxville, Tennessee. They had nine children, three sons and six daughters. Three of these nine children died before reaching their majority, and only three were living at the time of Judge Pearson's death. Two still survive. His son, Honorable Richmond Pearson, formerly a member of Congress, is now Minister to Persia. The other living member of the family, Mrs. Hayne Davis, is a lady of literary attainments and resides at Statesville, North Carolina.

In 1829 he began his public career by representing his county in the State Legislature, and was three times successively reëlected. In 1835 he was a candidate for Congress in his district, his competitors being Honorables Abram Rencher and Burton Craig, the latter being the successful candidate. In 1836, when but thirty years old, he was elected a judge of the State Superior Court, being one of the youngest men ever elected to that station in this state.

When first elected judge in 1836, and again in

1848, when he was elected to the Supreme Court bench, the legislature was Democratic, but he, although a life-long Whig, was chosen over his Democratic competitors. When he first began to ride the circuit as judge of the Superior Court, he maintained considerable state, always riding in his own carriage drawn by four horses, but after his reputation was established, and after the war had compelled him to wear homespun and discard his beaver hat, he was simplicity itself. Honorable A. S. Merimon, who was afterwards a senator in congress and later chief-justice, of our Supreme Court and a man of great dignity of bearing, went to Richmond Hill on one occasion to secure the release of some conscripts, and was horrified on his arrival to find the Chief-Justice ditching with his own hands in a bottom near the homestead. It is said he took great delight in working his garden, and thought no vegetables so good as those cultivated by his own hands. He owned several good plantations, but as a farmer was not a success. He would frequently suspend a lecture and take his class into his corn fields to drive out the cattle that had broken through his proverbially bad fences. During the war his hospitality was strained to such an extent that his barn and crib were emptied before the year was half gone, and his horses and cattle became so weak and poor that they often had to be lifted to their feet.

Notwithstanding his plainness in dress and his manner of living, he was at heart an aristocrat and

was proud of his family history and ancestral silver. He was ninth in a straight line from Brewster, the leading spirit of the Mayflower expedition. This fact may explain his ardent love for the Union, his unswerving devotion to Whig principles, and his absolute contempt of threats of personal danger of any kind.

The most striking characteristics of Judge Pearson were courage, justice and simplicity. His love of justice was innate and all-controlling. He was a great law teacher and his intercourse with his pupils was such as to establish lasting ties between himself and those whom he instructed. As an evidence of their affection for him the members of the profession erected a handsome monument to his memory in Oakwood Cemetery, at Raleigh, most of the contributors being members of the party opposed to the political views which he entertained during his lifetime. At that time about one-half of the seven hundred lawyers of the state had, at one time, been his pupils, and they loved their old Chief as children love their father. Judge John Kerr, who was the leader of the Whig party for a number of years, and one of the most brilliant lawyers of the state, was his student. Honorable Jacob Thompson, of Mississippi, Secretary of the Interior in President Buchanan's Cabinet, and Governor Ellis, of this state, were also among his students. At one time Judges Bynum, Settle and Faircloth, his students, were his associates upon the Supreme Court bench. Judges

Avery and Furchees, both of whom are lawyers of distinction and students of Judge Pearson, were on the Supreme Court bench after he died.

It is said that some time after he began the practice of law he and Tyre Glenn, then a young man and a deputy sheriff, were traveling along the upper Yadkin returning from a term of the court and discussing their future hopes in life, when Glenn said that it was his ambition to own the beautiful farm which spread out before them, and Pearson remarked that it was his ambition to be Chief-Justice of the Supreme Court of his state. The wish of each was realized, Glenn spending the latter part of his life on the plantation of which he was the owner for many years, and Pearson being Chief-Justice for nearly a quarter of a century before his death.

In 1848 he was elected associate justice of the State Supreme Court, and in 1856, on the death of Chief-Justice Nash, he was chosen chief-justice of that court, and was again elected in 1868, after the adoption of the new State Constitution,—having received the nomination of both political parties,—and continued in office until his death which occurred in Winston-Salem on the 5th day of January, 1878, while on his way to Raleigh to preside over the session of the Supreme Court.

As early as 1851, while Associate-Justice of the Supreme Court, Judge Pearson wrote a dissenting opinion in the case of Spruill vs. Leary,<sup>1</sup> in which

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<sup>1</sup> 35 North Carolina Reports, 225, 404.



case it was held by the court that where one, who had a fee-simple defeasible in the event of his dying without issue living at his death, conveyed the land in fee with general warranty to another, and afterwards died without issue, that the collateral warranty barred his heirs and those who claimed under him. On account of the strength of the reasoning and the reputation of the judge from whose opinion he dissented, the case gave him an enviable reputation. His opinion is indeed one of the finest specimens of legal reasoning ever written.

The opinion of the court was written by Chief-Justice Ruffin, one of the greatest lawyers who ever presided over the Supreme Court of the state, possibly the greatest equity lawyer the state has produced, and who, from his learning in this branch, was styled the Mansfield of America.<sup>2</sup> The opinion of the court remained undisturbed until 1852, when the same question was again presented to the court in the case of Myers vs. Craig.<sup>3</sup> At that time Judge Nash was Chief-Justice—having been appointed to fill the vacancy occasioned by the resignation of Judge Ruffin—and Judges Pearson and Battle were Associate-Justices. Judge Nash had been a member of the court at the time the former opinion was rendered. The holding of the court in the first instance was reversed and a *per curiam* opinion was written

<sup>2</sup> See the essay on Thomas Ruffin, by the present Chief-Justice of North Carolina, vol. IV, p. 277 — ed.

<sup>3</sup> Bushee's North Carolina Reports, 169.

by Judge Pearson at the conclusion of which he stated that he was directed by the Chief-Justice and his Associate-Justice Battle to state that they concurred in the reasoning and conclusion contained in the dissenting opinion filed by him in the case of *Spruill vs. Leary*. This is a tribute rarely paid to a judge by his associates under such circumstances. An investigation of the questions of law involved give a clear insight to the character and ability of Judge Pearson as a common law lawyer. The principles enunciated in this opinion, for which the bar of the city of Baltimore gave him a complimentary banquet, have never been disturbed and will remain, as long as time lasts, as a monument to its author.

When every other court in the state had been closed during the Civil War, the old log office which he occupied at his home at Richmond Hill was opened, and a man of small stature and quiet demeanor might be seen sitting there dispensing justice—sending conscripts back to their homes in spite of soldiers that lined the lanes in front of the house by hundreds and sometimes by thousands.

Judge Pearson had a genial temperament and was kindly disposed towards humanity. This was one of the traits which made him so popular with his pupils, and it can be observed in almost all his opinions construing the criminal law. This he sought to construe so as to mitigate its harshness as much as possible without doing violence to the elementary principles upon which it is founded. Mr. Kemp

P. Battle in his History of the Supreme Court of North Carolina, says:

His power of concentration was truly remarkable, and having a good memory he generally mastered the record of a case on a single reading and had occasion to ask but few questions of counsel. To a lawyer who had studied his case and talked sense he was very attentive and seldom interrupted him. He was impatient of reference to many books and preferred that counsel should argue their case from admitted principles and refer only to a few authorities in point. Seldom did he intimate his opinion on the points involved except by the suggestion that "I would like to hear from you on this point."

He and his Associates of that day wisely thought that it would shorten the argument of the case by letting each counsel have his say without interruption however faulty the argument might be; but he would promptly rebuke counsel when he wittingly or unwittingly traveled out of the record. His mind was so precise that he wanted every one to hew to the line. The law was his life, and in ordinary conversation he used legal phraseology from which to draw his illustrations. As a common law lawyer the country has, I think, produced few equals and scarcely any superiors to Judge Pearson.

He was so permeated with the law that even his wit consisted in an unexpected application of legal language to non-legal subjects. Governor Caldwell said to him on one occasion, while he was yet a young man: "Pearson, why did you let the Bishop confirm you? You know you are not fit to be a member of the church?" "Well," replied he, "when I was baptized my sponsor stood security for me, but I thought it dishonest to hold him bound for me, so I surrendered myself in discharge of bail."

The following conversation is said to have occurred between Mr. Battle and Judge Pearson on one occasion: Mr. Battle said: "Judge, please de-

cide a question of law for me. I have two brothers paying me a visit, one named William and the other Wesley. A lady in town has sent an invitation to 'Mr. W. Battle.' Whom shall I advise to accept the invitation?" As quick as a flash Judge Pearson replied: "Well, on the principle that every deed is construed most strongly against the grantor, I decide that both should go."

He held the position of chief-justice during the most critical period of our history. As a result of the Civil War our judicial system was in a chaotic condition. The Constitutional Convention of 1868 completely revolutionized our method of practice and procedure, by adopting a code of procedure fashioned after the New York code, and abolished the common law pleading and practice, and as a consequence many new and intricate questions arose, all of which were solved in a satisfactory manner under the guiding genius of the Chief-Justice. It is difficult to imagine a more trying position than that occupied by Judge Pearson at that time. Passion and prejudice had inflamed the public mind to such an extent that it was extremely difficult to administer the law so as to secure a satisfactory adjustment of the many opposing interests that grew out of that unfortunate conflict. Questions that had never been presented to the court for solution were being continuously pressed for consideration, an injudicious and unwise settlement of which would have added fuel to the flame and produced interminable con-

fusion. The policy of Judge Pearson during this trying ordeal fully exemplifies the axiom that a wise administration of the laws by the judiciary is more potent in strengthening and giving tone and character to a government like ours than any action that might lawfully be taken by the legislative or executive branches of the government. The permanent growth and development of our institutions can be secured only by a wide and patriotic administration of the law. While great responsibility attaches to the legislative and executive branches of the government, it remains for the judiciary to construe the law in accordance with the well-defined principles that have been wrought out by the best legal minds of the age. And although these principles are well-defined, yet the rules by which we are guided are flexible and should be applied in the light of contemporaneous history so as to do equal and exact justice to all parties concerned and at the same time meet the requirements of existing conditions. When passion and prejudice permeate the body politic, such matters can have no place in a forum of justice. The courts of the country afford the only barrier against which these forces may unsuccessfully contend. The fact that Judge Pearson during this exciting period of our history pursued the even tenor of his way, is but another evidence of the stability of our institutions and a lasting testimonial to the character of this eminent jurist. It was exceedingly fortunate for the people of the state that they should have then

had at the helm of the judiciary a judge whose learning and integrity were unquestioned and whose wise conception of the duties of the office which he held was such as to restore peace and tranquillity within our borders.

He was criticized on account of the course he pursued in the celebrated *Habeas Corpus* cases which arose in 1870.<sup>4</sup> Honorable W. W. Holden, Governor of North Carolina, declared certain counties to be in a state of insurrection and called out the state militia for the purpose of restoring law and order. The crimes alleged to have been committed in those counties were political in their nature, and the attempt to suppress them caused wide-spread prejudice throughout the state. It is not my purpose to enter into a discussion as to whether the Governor acted wisely or unwisely, and I shall therefore content myself with stating the historical facts of the case in order that I may be able intelligently to present the reasons which actuated Judge Pearson in his refusal to enforce the writ. After the counties in question had been declared to be in a state of insurrection a number of citizens were arrested and held in confinement by the military authorities. The persons thus confined filed a petition before Judge Pearson for a writ of *habeas corpus* which was granted. The officer who undertook to serve the writ reported that he had delivered the same to

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<sup>4</sup> *Ex parte* Adolphus G. Moore and others, 64 North Carolina Reports, 802.

Colonel George W. Kirk, who was in command of a large body of armed men, and that Kirk, after he had received the writ and had had a part of it read to him, declared he would take no notice of such papers; that such things had "played out;" that he was acting under the order of Governor Holden to disregard such papers. Thereupon Judge Pearson issued a second writ directed to the Marshal of the Supreme Court commanding him to produce the bodies of the petitioners wherever to be found, and also with instructions to wait upon his Excellency the Governor and exhibit to him the writ and make due return of the same. Colonel Kirk in reply to the service of the writ, said: "I hold the prisoners under the orders of W. W. Holden, Governor and Commander of the Militia." At that time Judge Pearson took the position that the writ of *habeas corpus* was not suspended, but that the judiciary was powerless to enforce it against the military authorities who were acting under the direction of the Governor in counties that were declared to be in a state of insurrection. Among other things he said: "But I have declared my opinion to be that the writ of *habeas corpus* is not suspended (*Ex parte Moore*), and I felt it to be my duty to enforce the writ, or exhaust the power of the judiciary."

The Governor addressed a letter to the Chief-Justice in which he stated that he had exhausted all civil remedies in attempting to restore law and order in such counties and that failing to do so he declared

them to be in a state of insurrection and had placed them under military control. A motion was made before Judge Pearson: First, for an attachment or rule to show cause, against the Governor, for not making a sufficient return to the writ of *habeas corpus*; second, If that was not proper "then for a like rule against George W. Kirk, and that the Marshal of the Supreme Court be directed to proceed in an effort to bring the body of Moore before him."

The first motion was denied on the ground that the Supreme Court had no power under the *Habeas Corpus* Act to arrest the Governor of the state. The second was denied on the ground that Colonel Kirk had a reasonable excuse in that he acted under the directions of the Governor. On the second day of August, motions were made by counsel for the petitioners to attach George W. Kirk for an insufficient return, and for a writ to some competent person to bring the bodies of the petitioners, and to call out the posse of the county if necessary. In disposing of this motion Judge Pearson made the following order:

The first motion is not allowed. The objection that the return, as the Counsel term it, is not sworn to, and other objections taken, are not relevant, for this does not purport to be a return, but a refusal to make a return by the orders of the Governor.

Treating it however as a refusal, the second motion is not allowed, for the reasons set out in the opinions delivered by me. I can say no more than I have already said: The power of the judiciary is exhausted — I have no *posse comitatus*. In this particular, my situation differs from that of Chief-Justice Taney, in



Merryman's case. He had a *posse comitatus* at his command — but considered the power of the judiciary exhausted, without calling it out, he did not deem it to be his duty to command the Marshal with the posse to storm a fort.

This was the only conclusion that could have been reached under the peculiar circumstances with which Judge Pearson was confronted at that time. Any other course on his part would have produced a conflict between the judicial and executive branches of the state government in which the judiciary would have been placed in a position where it would have been powerless to enforce its orders. Discussing this last phrase of the question, Judge Pearson said:<sup>5</sup>

<sup>5</sup> Judge Pearson in disposing of this case was no doubt influenced in a large measure by the opinion of the distinguished Chief-Justice of the United States in the Merryman case. Chief-Justice Taney denounced in very strong language, the action of the military authorities of the United States for refusing to recognize the writ of Habeas Corpus and stoutly contended that such a refusal on their part was contrary to the genius of our government and in violation of the Constitution; that such action on the part of the military authorities rendered the judiciary powerless to secure a fair and impartial enforcement of the law. But he took the position that the judiciary was not able by its writ to take from the custody of the military authorities one held in confinement pursuant to an order of the commanding officer. In discussing that case among other things the Chief-Justice said:

"In such a case my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States, for the district of Mary-

I have considered the matter fully, and have come to the conclusion not to direct it to a Sheriff. The Act gives a discretion. In the present condition of things, the counties of Alamance and Caswell being declared to be in a state of insurrection, and occupied by military forces, and the public mind feverishly excited; it is highly probable, nay, in my opinion, certain, that a writ in the hands of a sheriff, with authority to call out the power of the county, by which he is commanded, with force if necessary, to take the petitioner out of the hands of the military authorities, will plunge the whole state into civil war.

If the sheriff demands the petitioner of Colonel Kirk, with his present orders, he will refuse, and then comes war. The country has had war enough. But it was said by the counsel of the petitioner, "If in the assertion of civil liberty, war comes, let it come! The blood will not be on your hands, or on ours; it will be on all who disregard the sacred writ of *habeas corpus*. 'Let justice be done if [though] the heavens fall.'"

It would be to act with the impetuosity of youth, and not with the calmness of age, to listen to such counsels. "Let justice be done if [though] the heavens fall" is a beautiful figure of speech, quoted by every one of the five learned counsel. Justice must be done, or the power of the judiciary be exhausted; but I would forfeit all claim to prudence tempered with firmness, should I, without absolute necessity, add fuel to the flame, and plunge the country into civil war, provided my duty can be fully discharged without that awful consequence. Wisdom dictates, if justice can be done, let "heaven stand." Unless the Governor revokes his order, Colonel Kirk will resist; that appears from the affidavit of service.

The second branch of the motion, That the power of the county

land, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his Constitutional obligations to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."

be called out if necessary to aid, in taking the petitioner by force out of the hands of Kirk, is as difficult of solution as the first.

The power of the county, or *posse comitatus*, means the men of the county where the writ is to be executed: in this instance Caswell, and that county is declared to be in a state of insurrection. Shall insurgents be called out by the person who is to execute the writ, to join in conflict with the military forces of the state?

It is said that a sufficient force will volunteer from other counties. They may belong to the association, or be persons who sympathize with it. But the *posse comitatus* must come from the county where the writ is to be executed; it would be illegal to take men from other counties. This is settled law. Shall illegal means be resorted to in order to execute a writ?

Again; every able-bodied man in the state belongs to the militia, and the Governor is by the Constitution "commander-in-chief of the militia of the state," Article III, Sec. 8. So the power of the county is composed of men who are under the command of the Governor; shall these men be required to violate, with force, the orders of their Commander-in-Chief, and do battle with his other forces that are already in the field? In short, the whole physical power of the state is by the Constitution under the control of the Governor. The Judiciary has only a moral power. By the theory of the Constitution there can be no conflict between these two branches of the government.

Now that more than thirty years have elapsed, the lawyers of the state are able to consider these questions from a different viewpoint, and I am sure that the members of the bar, with few exceptions, are of the opinion that Judge Pearson pursued, not only the proper course at that time, but that his opinions as to legal questions involved are strictly in accord

with the law of the land. He exhausted every means within his power to vindicate the majesty of the law, but he did not attempt the impossible.

Associate-Justice Reade in a memorial address which he delivered a few days after the death of the Chief-Justice, in referring to Pearson and Ruffin, among other things said:

If Ruffin had more scope, Pearson had more point. If Ruffin had more learning, Pearson had more accuracy. If Ruffin was larger, Pearson was finer. Both were great.

I know of no court the decisions of which more clearly define the common law than that of our Supreme Court. The fact that our court had, from the beginning, been composed of eminent jurists, among whom might be mentioned the names of Taylor, Iredell, Gaston, Battle, Ruffin, Henderson, Ashe, Daniel, and Manley, made it all the more difficult for Judge Pearson to maintain the high standard established by his predecessors.

The measure of success which attended his efforts can be estimated only by carefully considering the work he accomplished during his term of office. He was infatuated with the law and devoted his life to the study of its principles. He was a lawyer in the best sense of the word. He possessed an analytical mind which enabled him to grasp the salient points in a discussion without touching those extraneous matters which are necessarily present in all legal controversies. While he entertained the highest respect for the opinions of others, at the same time, he

preferred to be guided by logic and reason in solving intricate questions and rarely ever cited the opinions of other courts, except in cases wherein he desired to enforce a point which he considered vital to the question under consideration. His logic was faultless and the principles which he announced were so clear and well defined that the members of the bar, not only understood the law as he wrote it, but were fully convinced by his manner of statement that his conclusions were correct. Instead of relying upon precedents to sustain his views, he gathered his strength from the principles of the law and never gave his sanction to any opinion which was not in consonance with the fundamental principles of our jurisprudence. He possessed that equipoise of mind so essential to a correct determination of the intricate questions that characterize legal controversies, and, with a mind devoid of prejudice, he was able to discern the truth by an impartial application of the elementary principles of the law, without being influenced by those considerations which have induced many eminent judges unconsciously to decide the law so as to meet emergencies instead of applying the established rules of construction with an unflinching determination to do equal and exact justice between parties litigant.

He was unassuming in his manner and never sought to impress others with his knowledge, but his opinions upon legal questions were such as to convince those who read them that he possessed a su-

perb legal mind, and when he died he left a reputation which is an incentive to the student who seeks to attain that distinction at the bar which has ever characterized the great lawyers of the centuries.

He has left his impress upon the character of a people already rich in the lives of great men. North Carolina is proud of her soldiers, her statesmen, and her orators, but her proudest possession is her courts of justice, and the dignity, the wisdom, and the impartiality with which her judges and lawyers administer right between man and man. Much as is due to others, I am yet persuaded that Judge Pearson was one of the master spirits in the foundation and development of these institutions.

It may be said that fewer of the opinions of Judge Pearson have been overruled than those of any of the other judges of our Supreme Court.

He brought to the study of the law the energy of a toiler, the investigation of a scientist, and the enthusiasm of a devotee. With him the law was neither a trade nor a business nor an avenue to wealth, but a solemn and dignified profession attended with vast responsibilities and affording unlimited opportunities for good. With his logical mind and fine sense of right he could see no law without reason, nor precedent without justice, and no administration without firmness tempered with mercy. He had unflinching courage and never applied the law as an instrument of expediency. Neither the storm of passion, the bitterness of party, nor threats of vio-

lence could swerve him from the beaten paths of the law. He loved the old masters of the law, studied their works with the passion of youth, followed the law books to their fountain head, and was the foe of radical innovation. He lived with Blackstone and Coke and Littleton and knew Kent and Marshall and Story. With him the common law was the decalogue of jurisprudence, and he accepted no amendments not made necessary by the changes of time and condition. His opinions are more than repeated precedents, abstract statements and tedious details. They glow with life, abound with reason and clothe the law in rich apparel and endow its precepts with soul and spirit. He saw in our courts the hope of the helpless, the resort of the injured, and the shield of the defenseless, and he never permitted their diversion to unworthy purposes.

Our state is better for his life, our profession is richer and fuller for his great works, and I believe the impetus of his teachings and the wisdom of his opinions will be the proud legacy of our profession for generations yet to come.

WILLIAM GREEN.





WILLIAM GREEN

From a daguerreotype in possession of Mrs. James Hayes of Richmond, a daughter of William Green.







# WILLIAM GREEN.

1806-1880.

BY

ARMISTEAD CHURCHILL GORDON,

*of the Virginia Bar.*

THE name of William Green will long remain one to conjure with among the legal fraternity, though he belonged to a period when the abstruse learning which he possessed and the technicalities of the procedure which he illuminated were more valued than they are now. Mr. Green practised his profession in an environment and under conditions that have long since, in large measure, ceased to exist. His is the pundit's reputation, however, that is yet fondly dwelt upon by the juridical raconteur at the social gathering in his native state; and his are the marvelous annotations, which, "Thick as autumnal leaves, that strow the brooks in Vallombrosa," adorn the margins of treasured text-books and reports that the legal bibliophile in Virginia will show very proudly to his learned brother, who may visit him for a social hour in his library, when the talk shall be of the great jurisconsults who have departed.

Such a one will tell you with perceptible pleasure

that he bought the book at the sale of Mr. Green's library, and that as a legal treasure he prizes it beyond anything on his shelves; and he will show you the notes in the clear and accurate handwriting that bespeaks the clear and accurate thought; and turning the leaves, will say:

"To illustrate inadequately but characteristically the scope of his learning and the grasp of his mind, let us look for instance, at his copy of 'The Attorney's Practice in the Court of King's Bench,' by Robert Richardson of the Inner Temple, Gent., which I have here. You will observe from the title-page that this is the seventh edition, two volumes in one, and that it was printed for James Moore, 45 College Green, Dublin, in 1792. Turning the leaf, you will see Mr. Green's autograph, with the date 1843, and this 'Note,' which he has made concerning the book: 'The first edition of this work appeared in 1739, the second (with the second volume then first added, as it seems) in 1743, the third very much enlarged in 1750, the fourth with large additions in 1759 (Warr. Bibl. Leg. edit. 1763, p. 29), and the fifth (now before me) in 1769. My copy of the edition last mentioned I have since exchanged with Thomas J. Humphreys, Esq., for a copy of Crompton's Practice, having first noted in the margin of this copy the paging of that for the sake of the references to it which are to be found in other books. The sixth edition appeared in 1776. Warr. Bibl. Leg. ed. 1782.' Going farther, we find the preface

carefully annotated by Mr. Green, and certain sentences of it marked off with brackets, which he explains by a note to the effect that 'what follows between brackets has been added' since the fifth edition, 1769. Then he adds, as you will observe: 'I propose to distinguish in the same manner the additions and alterations in the body of the work.' This, you see, he has done throughout, with copious citations of additional cases, and almost innumerable cross-references."

Then your bibliophile host will carefully place the book in your hand, with the comment, made in the absolute assurance of conviction that his statement is not to be questioned — (and it never is), "I will engage that no attorney practising in the Court of King's Bench in Mr. Green's day was more familiar with the procedure there in all of its details than he was, and probably very few so familiar."

William Green was of a line of ancestry, which illustrated in its members both the courage of soldiers and the ability and learning of strong lawyers. Indeed, his earliest known ancestor upon the paternal side was a professional soldier, by name William Green, who was a member of the body-guard of His Majesty, William of Orange; and, though by no means famous for military exploits, was yet a progenitor of no few American soldiers, who have left shining names upon the muster-roll of their country's heroic sons. This King's body-guard, to which the earlier William belonged, was commanded by



Charles, Earl of Manchester, and was composed of one hundred men, who are said to have been selected for their stature and robustness, and were a sort of Protestant "Beef-Eaters" of their day. The picturesque character of their uniforms has been preserved to us on the pages of contemporary history; and William Green, yeoman of the Orangeman's body-guard, comes down to us clad in a scarlet coat which reached to his knees, scarlet breeches richly guarded with black velvet, and a broad-crowned cap, with a velvet band and orange ribbons. He doubtless made a fine appearance, with his more than six-foot figure and his handsome, appropriate dress; but, like many another well-dressed warrior of an old-time canvass, history is silent as to his war-like achievements.

This William, the body-guardsman, had a son, Robert Green by name, who was born in 1695, and who declining the military example of his father, came to the colony of Virginia when about twenty-two years of age, to adventure his fortunes under the more peaceful guidance of a maternal uncle, William Duff, who appears to have combined with the inoffensive religion of the Quaker a shrewd Scotch aptitude for making money. Mr. Duff and his nephew settled in what is now King George County, a part of the historic Northern Neck of Virginia, that was famous in the later colonial era for its "Barons of Potowmack and Rappahannock," and which is yet more noted since, as having embraced within

its confines the birth-places of George Washington and Robert E. Lee. Here young Green and his uncle Duff fell in with and became jointly interested in certain land exploitations of a firm in which Joist Hite and Robert McKay were members. The Virginia case of *Hite vs. Fairfax*,<sup>1</sup> which was decided in May, 1786, tells the interesting story of a long litigation, lasting more than fifty years, over the validity of some crown-grants of land in the Northern Neck, made to Lord Fairfax, to which Hite and his associates laid claim by virtue of orders in council for a large domain on the west side of the Blue Ridge, coupled with the condition of settling a certain number of families in this then untenanted wilderness within a given period. Hite himself removed to and settled upon the tract, parts of which were sold to various incomers in performance of the condition named. Lord Fairfax thereupon entered a general caveat against all orders of council, deeds, patents and entries issuing from the Crown office for lands lying in his proprietary, situate within the heads of the rivers Rappahannock and Quiriough, or Potowmack, the courses of said rivers and the Chesapeake Bay. Out of this caveat grew the case of *Hite vs. Fairfax*, which was won ultimately by Hite and his vendees;—a litigation which for a period retarded the settlement of the lower Shenandoah Valley, and caused the immigrants, whom Hite had brought in from Pennsylvania, to push their

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<sup>1</sup> 4 Call's Reports, 42.

way up the Shenandoah River to regions that were unclaimed by his Lordship.

William Duff, the Scotch Quaker, departing this life, left his interests in the lands of the Hite partnership to his nephew, who had married Eleanor Dunn, a Scotchwoman; and Robert Green, leaving King George County in the Northern Neck, moved west into Culpeper County, Virginia, to live, where many of his descendants flourish to this day, and where Mr. William Green for many years practised his profession. Of his marriage with Eleanor Dunn there were born to Robert Green seven sons. The fourth of these sons was Colonel John Green, who exemplified the soldierly qualities of his blood by service in the armies of the American Revolution, and won distinction at the battles of Brandywine, Monmouth and Guilford Court House.

John Green entered the military service of Virginia as Captain of the First Virginia Battalion, September 4th, 1775. When his command was mustered into the Continental Line, he was reelected Captain, January 20th, 1776, at which time he was under the command of General Andrew Lewis at Williamsburg, Virginia. In the fall of that year he served under Washington in New York, and was wounded in a fight at Mamaroneck, October 21st, 1776. He continued in the army for eight years, and General Henry Lee speaks of him, in his "Memoirs," as "one of the bravest of brave soldiers."

Colonel John Green's wife was Susanna Black-

well, a granddaughter of that William Blackwell, a graduate of Oxford University, who came to Virginia early in the eighteenth century, and locating in Northumberland County, became the progenitor of a line of distinguished descendants in Virginia and Kentucky. The son of John Green and Susanna Blackwell was William Green, who married Lucy Clayton Williams, of the family to which belonged the great English Reporter, William Peere Williams, and had issue a son, John Williams Green, who was born November 9th, 1781, and died February 4th 1834,—a gallant soldier of the War of 1812, a Chancellor of the Commonwealth, and a Judge of its Supreme Court of Appeals.

Judge John Williams Green was twice married. His first wife, to whom he was united December 24th, 1805, was Mary Brown, and by this marriage he had four sons, the oldest of whom was William Green, the subject of this paper. His second wife was Million Cooke, a granddaughter of George Mason, author of the Virginia Bill of Rights. Of this last marriage were born three other sons, one of whom, Thomas Claiborne Green, was an able and honored Judge and President of the Court of Appeals of West Virginia.

William Green was born in Fredericksburg, Virginia, November 10th, 1806. From his earliest boyhood he possessed a singular aptitude for the acquisition of knowledge, and for an indefatigable diligence in research. These faculties stayed with

him through life; and in combination with the remarkable simplicity which characterized his intellect, his moral nature, his views and his purposes,—a simplicity which is so often at once the conspicuous quality and adornment of great minds,—served to give him that fame, which must always be his among the members of his profession, of having been perhaps the most learned lawyer and accomplished jurist of his generation in America, if not of all generations upon the American continent.

An interesting story is told of him by Judge George L. Christian of Richmond, in the pages of the "Virginia Law Journal," as having been personally related by Mr. Green himself, which pleasingly illustrates the habits of his mind as a young student. Judge Christian says:

His room was in an office in the yard, some distance from the "great house." He was very fond of cats; would get up every morning as soon as it was light enough to read, put on his gown and slippers, put a kitten in each gown pocket, get his book and begin pacing the floor and reading. No one called him to his meals until the rest of the family had left the dining-room; the servant knew what he preferred to eat, placed that before him, and he ate it in absolute silence, no one daring to ask him a question. He glanced from his plate to his book, lying open before him, and this was kept open so that he could glance at it even when washing his face and hands. He told the writer he verily believed that for six months at a time he would speak to no human being—entertained and absorbed entirely by his books and his kittens. In after years, although always an ardent student, he became more companionable, and we have frequently seen

him in his own quaint way, in our judgment, one of the most agreeable and entertaining men that we ever saw.

Beyond a short period spent at the schools of Mr. Goolrick in Fredericksburg, and of Mr. Lewis in Spottsylvania County, where he had as his school-mates, among others, Raleigh Travers Daniel and William Joseph Robertson, the former of whom became a distinguished Attorney-General of the Commonwealth, and the latter one of the ornaments of its Supreme Court of Appeals, Mr. Green was largely self-taught, save for the instruction which his father was enabled to give him personally out of the busy hours of a laborious and exacting professional career. But Mr. Lewis, in the short period of the lad's stay in the school at Llangollen, had enlarged his enthusiasms, and had opened to his view the door of that understanding and appreciation of the classic authors of antiquity, which inevitably serves to make wider the intellectual horizon, and to beautify and adorn the progress of the mind through life; and he had already prophesied, with the prescient perception of the real teacher, the future distinction of his young pupil.

But beyond aught that any teacher might do for him, he was doing all this early time for himself; for so visibly great was his thirst for knowledge, and so inspiring to the minds which came in contact with it was his own, that his father was moved to relearn his forgotten Greek, which he studied again after becoming a Supreme Court judge, in order that he

might thereby be enabled to continue the fellow-student of his son. There are now extant in the Green family Greek exercises in the handwriting of Judge John Williams Green, done at the time when he and his young son together "followed knowledge like a guiding star," in a mutually delightful, intellectual companionship.

Mr. Green was admitted to the bar in 1827, when he was not yet twenty-one years of age; and from that time to his death in 1880, he illustrated the prodigious capacity of the human mind for the acquisition of knowledge, and was regarded by all who knew him as a marvel of learning. While throughout his extraordinary career his devotion was primarily to the law, he at least did not find her that jealous and exclusive mistress which she has been ever represented by eminent law-teachers to embryo lawyers. On the contrary his career seemed rather to demonstrate that the lawyer who is really a student is better equipped for whatever mental work he may undertake outside of his profession, other things being equal, than other men in most other callings in life. Mr. Green's devotion to the classic authors of antiquity was characteristic; and during the period when he led the life of the Virginia circuit court lawyer of his generation, riding the circuit, in which he lived and practised, from court house to court house, he made it a habit to carry with him some Greek or Latin writer, stowed away in his great-coat pocket or in his portmanteau, for

perusal as he jogged along on horseback, or found himself alone in the little tavern at the county seat. He was sometimes heard to express regret that he had dedicated hours to such studies, which might have added to his stock of legal lore, if more judiciously spent; but it is possible that these expressions were not so poignant as the lamentation on his death-bed of a great professor of Greek in a German University that he had squandered his career in the study of the prepositions  $\epsilon\pi\iota$  and  $\epsilon\nu$  when he should have devoted himself exclusively to  $\epsilon\pi\iota$ .

Mr. Green's diversions from the fields of jurisprudence were not, however, directed exclusively into those regions which have been illumined and warmed by "the classics" of Greece and Rome; and the knowledge which he possessed of the no less classic writers of England was almost as extensive in its scope and as profound in its understanding as was the knowledge which he possessed of the law. Even the obscure origin of some popular phrase would sometimes serve the purpose of arousing his interest and spurring his enthusiasm, until the subject was exhausted in his authoritative discussion. This is curiously exemplified by his historical treatment, in a personal letter to a friend about a year before his death, of the genesis of the proverb "*Vox populi, vox Dei.*" Upon this odd subject he poured out a wealth of narrative authority, drawn from the most unexpected sources, which would seem to the average reader, who did not know the man, to have



been deduced at the expense of time and labor far beyond its worth. But such was Mr. Green's memory, and so accurately trained was his mind in habits of study, that the production of his authorities upon any given question, whether legal or literary, was always a matter of comparative ease to him.

Very soon after he came to the bar he began to contribute articles to newspapers and magazines, which covered a wide range of politics, of history, of general literature and of law. All was grist that came to his mill; and whatever proceeded out of his hopper was of the best quality. In many of the journals and periodicals of the time this work lies scattered, ungarnered as yet into the receptacles of those book-covers which have served to make or keep the popular reputations of many men who were unworthy to loose his shoe-latchet; and which if gathered together would cause men to marvel at the many paths of human thought along which he had traveled.

To his brethren of the bar in these days of his circuit-riding, many of whom were gentlemen who followed the profession of the law because of its respectability and of its opportunities for forensic and political distinction, no less than for the emoluments which it offered, it was a source of great pleasure to hear Mr. Green talk. The love of hearing "talk," whether in the shape of addresses and set speeches, or in that less formal one of the conversational harangue, has always been more or less a characteristic of the

average Virginian; and in the nights at the tavern, after the Court had adjourned for the day, when the lawyers were gathered together, any topic, which chanced to present itself, of politics, literature or a law-point, was often kindled with the illuminative knowledge and apt allusion of Mr. Green. The late John Randolph Tucker has recorded an amusing instance of one of these "*Noctes Ambrosianæ*" of the older generation, which is characteristic of Mr. Green's play of fancy in combination with an expression of his legal lore. Mr. Tucker gives us the following story:

At the county tavern at Orange Court House in that period, the judge (Field) and the bar assembled in the evening, after the labors of the day were over, and professional, public, and historic and literary matters were discussed with clever and playful criticism, in which sharp blows were given and received without temper or offense. Three lawyers were there who took part in the exercises of debate,—the judge and the remainder of the bar as auditors—General Gordon, William Green and Alexander R. Holladay; General Gordon admired and was better read in Shakespeare than in the works of my Lord Coke. On this occasion he was dilating (not diluting, as a wag once said of another speaker), on the marvelous genius of the great poet. He rose (he generally did in conversation, when his talk became something of a speech), and held the floor without dispute and not under the prior rule. He permitted questions from the audience, which only sharpened his wit and gave spirit to his eloquence.

Green and Gordon were great friends and mutual admirers. Each admired in the other what he did not possess. Gordon dreaded Green's nice point of law; Green feared Gordon's eloquence before the jury. Hence their tactics, when opposed, were diverse. Gordon strove to brush away Green's obstructive legal

objections, while Green sturdily interposed them. For heaven's sake, cried Gordon one day, let us get to the jury. No, said Green, for if we do, my case is lost.

On the occasion under discussion, Gordon spoke of the myriad-minded Shakespeare, whose knowledge of the human heart was as if he had made it; that he seemed to know all human vocations, as if he were a master-workman in it, and that in a word, *nil tetigit quod non ornavit*.

At this point Green, who was quietly walking up and down the room, listening with genuine interest to the eulogy on Shakespeare, interposed with the remark:

"Well, General, I am not disposed to depreciate your beautiful tribute to the immortal bard; but it is due to loyalty to our profession to affirm with confidence, what I am ready to maintain before the court, that whatever he knew of other vocations, he was not even a tyro in the scene of jurisprudence."

Gordon (with emphatic contempt): "Well, I suppose he could hardly compete with a county court lawyer in the trial of a petty case before the County Court of Orange. But I challenge your proof."

Green: "In answer to your challenge, I allege he showed utter ignorance of the simplest maxims of law in the decision of the case, *In re Shylock*."

Gordon: "Who the —— ever heard it called *In re Shylock*?"

Green: "I know no other way to cite it; but I affirm the decision was utterly absurd."

Gordon: "No doubt it is unintelligible to the pettifoggers who practise in the county courts. Do you propose to drag down the winged Pegasus of Shakespeare's genius, and drive him to the tumbril-cart of your petty County Court?"

Green (not offended at this playful badinage): "Well, General, notwithstanding your objurgatory expressions, I proceed to show that the judgment was wrong."

Green (now adopting the semi-Socratic method, which Gordon did not like), proceeded:

"You admit that when A grants anything to B, the law implies with it the grant of all that is necessary to the enjoyment of the thing granted. You concede that?"

Gordon: "No, I'll be hanged if I do! But for the sake of argument, I admit it."

Green: "Therefore, when Antonio granted to Shylock a pound of flesh to be taken from about his heart, the law implied that so much blood was granted with the flesh as must be shed in order to obtain the legal possession of the pound of flesh granted. But Mistress Justice Portia held that he could not take the flesh, because blood would be shed in doing so, which blood was not granted — contrary to the simplest maxims of the horn books of the law. Hence I say, Shakespeare knew nothing of law."

The General was not prepared to meet this nice objection, and emptied the vials of his playful wrath upon his learned friend for questioning Mistress Justice Portia's judgment.

At this point Mr. Holladay intervened:

"But, Mr. Green, may not the decision be vindicated on the old case of *Collins vs. Blantern*? This was not a case of grant. It was an executory, not an executed contract. A contract to take flesh and blood from the heart of a man involved his life; it was a contract against law and for crime. It was void, and could not be enforced."

Gordon (exultant): "Now, Mr. Critic, what do you say to that?"

Green (with all the gravity of a barrister in the appellate court): "The point made by Mr. Holladay is very ingenious. I will look to see if the authorities sustain it. But, General, if well taken, it leaves my contention untouched; for as Mistress Justice Portia based her decision on the ground I objected to, and did not assign as a reason for it that offered by Alexander Holladay, I insist that Shakespeare may have decided rightly, but for a wrong reason; and, therefore, was no lawyer."

The discussion closed with merry laughter, and the parties retired to bed, with mutual feelings of admiration and affection.

Stories like this serve to show Mr. Green in his social relations with the members of the bar, who were his friends and associates. His kindness and benevolence of character were proverbial in all the relations of life; and his boundless love of learning was not more distinctively a part of him than were his domestic traits and his affection for the home life and for his family. On April 6th, 1837, he married Miss Columbia E. Slaughter, a daughter of Mr. William Slaughter of Western View, Culpeper County, by his second wife, Virginia, daughter of William Stanard of Roxbury, and his wife Eliza Carter of the family of the Carters of Blenheim. Of this marriage were born a son and a daughter,—the son, John Williams Green, a gallant youth, who fell in the flower of his promise, a soldier of the Confederacy, on September 22d, 1863, at the battle of Liberty Mills, in Madison County, Virginia, aged twenty-five years,—and was mourned by his father throughout his remaining years with the grief that followed the death of the young Marcellus;—the daughter, Elizabeth Travers Green, who married in June, 1861, Mr. James Hayes, a merchant of Fredericksburg, Virginia, and still survives.

Surrounded during a long period by the delights and blessings of a happy domestic life, Mr. Green continued to pursue the practice of law in the circuit of his first adoption, composed of the Piedmont counties of Culpeper, Rappahannock, Orange and Louisa, though with a steadily growing frequency of

resort to Richmond, whither his reputation and his talents constantly beckoned him; until in 1855, for the sake of the wider field which the Capital City offered, and perhaps even more for the sake of the ready access to books and libraries which it afforded, he removed thither, and there spent the remainder of his life.

He died July 27th, 1880, after a brief illness, and lies buried in the Valhalla of Virginia's worthies, Hollywood Cemetery, on the north bank of the James River near the City of Richmond.

Mr. Green, though always deeply interested in the significance of contemporaneous politics, and possessing a knowledge of political history that was as varied and extensive as it was profound, cherished no ambitions of political preferment, and held no office in his long career save when for a period during the war between the states, and under the compulsion of that maxim which avers that "*inter arma leges silent*," and of loyalty to the cause which his people had espoused, he filled a position of trust in the Treasury Department of the Confederate States; and later, when the struggle had ended, he was for a while Judge of a tribunal known as the Court of Conciliation, which was created by authority of the military government then directing and controlling the affairs of the unreconstructed Commonwealth, the difficult duties of which position he is said to have discharged with ability and to the satisfaction of his people.

In 1870 he was elected to the Professorship of law

in Richmond College; but this post, congenial as it doubtless was to his tastes, as affording both invitation and opportunity for the gratification of his most eager inclinations, was found to involve labors beyond the physical strength which he then possessed, when superadded to those of his practice in the courts. So that after a brief experience in the chair of a Professor, he surrendered it, to devote all his attention to the composition of his law-writings, and to his practice. Beyond these positions, he held no others of a public character, save that he was Vice-President of the Virginia Historical Society, and for a long time Chairman of its Executive Committee. This afforded him, however, recreation from his more arduous pursuits, and a relaxation which he greatly enjoyed. His investigations into the sources of the earlier history of his native state, so rich in material even yet unutilized, were frequent; and like all his other inquiries were searching. An instance of this kind of work, which to him was rather play, is his paper upon "Some Localities distinguished (more or less) in Virginia Annals, during a quarter of a century, from the first landing of English Colonists at Jamestown," which has been described as "a fair sample of his method of working a historical mine."

The paper, incomplete in its conclusion, is, as far as it goes, an exhaustive account of the various places in that earliest known portion of Virginia, which has since come to be spoken of, on account of its associations, as "The Cradle of the Republic."

Though Mr. Green took no active part in politics, his views on governmental and party policies were established upon principles that deep study and thoughtful consideration had very firmly fixed. These views he was at all times and against all comers prepared to champion, if necessary; and an interesting instance of his resolution in this respect is afforded in his part of an unpublished correspondence, in 1859-60 with the Honorable John A. Andrew, later the famous War Governor of Massachusetts, who was at that time a distinguished leader of the young Republican party, and entertained views upon the questions that stirred men's souls in those days as firmly settled as they were antagonistic to those of Mr. Green.

This correspondence is in the shape of two letters, one of which, dated December 30th, 1859, is from Mr. Green to Mr. Andrew, and the other dated January 16th, 1860, is Mr. Andrew's reply. Each letter, couched in terms of respectful consideration, and each bearing the unmistakable characteristics of its writer's mentality, is of very considerable length.

The subject under discussion was one on which the two men stood as far apart as the poles, in their inherited traditions, their individual temperaments, their personal associations, and their political beliefs. It was a case of hammer and anvil, and the "John Brown Raid" was the red-hot object that lay between.

Mr. Green, after the conviction of Brown by a Vir-



ginia jury, and his sentence to death by the criminal court of the Commonwealth in which he was tried, had been employed to make application in behalf of the convicted man to the Supreme Court of Appeals of Virginia for a writ of error, and to argue the case for Brown before that Court in the event that the writ should be granted. The application had failed, and the writ had been refused. Mr. Green's letter to Governor Andrew, indicates, in its beginning, some previous correspondence between them bearing upon the application for the writ; and showed also that Governor Andrew had requested Mr. Green to prepare a paper on the subject for a Boston law periodical. Mr. Green writes:

Several considerations prevent my complying with your polite request to prepare for the "Monthly Law Reporter" (Boston), a statement of Brown's case, chief among which is the want of leisure. Accidentally just now there are pressing on me simultaneously professional avocations of more than usual consequence and difficulty. Besides, which, the case itself, as presented to our Court of Appeals (wherein alone I have authentic information respecting it), is really one of intrinsically far less than ordinary interest to a reader, inasmuch as it brought up no question of actual guilt or innocence, but only (certainly, for the most part), questions of a purely technical character touching the regularity of the proceedings. And since the court, conformably to constant usage in such cases, delivered no reasons for its refusal to grant a writ of error, save that the judgment complained of was "plainly right," it would be, without a prolixity too tiresome for any human patience (I mean among mere readers of law reports), impossible to furnish a statement which would enable a fair judgment to be formed concerning the action of the court. What point or points

were really decided cannot be known or even imagined, but from a careful, intelligent comparison of the entire record (at least, the indictment and bills of exception at large), with the petition. And I respectfully suggest that if any report be made of the case, fairness requires that it should consist of the record (or such parts thereof as I have indicated) and the petition, together with such a statement as I have heretofore given you concerning the action of the judges.

Mr. Green, thereupon, proceeds to discuss a then recent speech of Mr. Wendell Phillips upon the subject of Brown's trial, and to present, from the standpoint of the Virginia slave-owner of the period, the view of slavery then held in that state even by those who abhorred the doctrine of secession, as pronounced by the States Rights Democrats. This discussion would appear from the context of the letter, to have been elicited by what Governor Andrew had written to Mr. Green in a former letter "concerning both John Brown and the subject of slavery."

"The latter is not with me," says Mr. Green, "any *noli me tangere*,—so far, I mean, as relates to fair discussion respecting it. By whose original fault it took root here it boots little now to inquire; though concerning that point I do not blush to compare the records of the past with either Old or New England. In the preamble to our first State Constitution, adopted unanimously on the 29th of June, 1776, and retained as a preamble to each of our subsequent constitutions, it was recited truly that the King of Great Britain had, among other outrages, prompted 'our negroes to rise in arms among us, those very negroes, whom by an inhuman use of his prerogative, he had refused us permission to exclude by law;' while history testifies that the negroes whom thus we would have excluded but could not, were brought hither

in ships, by crews, as the merchandise, of people of New England. The question is, what shall be done with their descendants, remaining enslaved among us,— a question impossible to be discussed in few words, and concerning which, as *de Carthagine, satius est silere, quam parum dicere*. This subject, so full of difficulty to those most concerned therein, and who practically know most about it, should be with modesty handled by those who have none but a theoretical knowledge respecting it,— a modesty more peculiarly becoming the descendants of those on either side of the Atlantic, by whom it was in effect forced upon us.”

This letter was written within a month after Brown’s execution at Charleston on December 2d, 1859; and its discussion of the then fiercely burning question of slavery, and the act of Brown and his associates at Harper’s Ferry, inevitably served to bring to the front an expression of Mr. Green’s individual opinion of that strange character, who in the contemplation of his deed and of his death has been since, and still is, alike apotheosized as a martyr and execrated as a murderer. Mr. Green writes further:

Whether these malefactors should have been dealt with as they have been by the authorities of this state in making them undergo *supplicium ultimum*, is what I thought of very little, after undertaking to appear in the Court of Appeals for one of them. From that moment till the fate of his application for a writ of error was known, I devoted myself to the purpose of reversing the judgment against him, if possible, with as much zeal as if I had believed him innocent; and this conduct accorded clearly with all my notions of professional duty. When there remained no hope for any of them but in the prerogative of mercy, there was that in my situation, from the cause just now mentioned, which made it improper for me to take part against them, and utterly useless

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to take part in their favor, even if I could under other circumstances have been of any service to them. I therefore remained neutral.

With no hesitating blade Mr. Green cut the Gordian knot of an ethical question, which has not yet ceased to disturb the hesitating consciences of less profoundly convinced practitioners of the law,—the question of whether the lawyer, who is fully assured of the guilt of his client, should yet exhaust all the weapons in the armory of defense in his behalf. No doubt entered Mr. Green's mind for a moment as to where his duty lay; and with a moral courage of the loftiest type, he permitted no thought of how the inflamed public opinion of the people among whom he lived might regard his espousal of the cause of the convicted leader. His duty lay clear and shining before him; and he performed it "with as much zeal as if he had believed him innocent," and doubtless with as much ability as he had ever shown in any cause of whose entire righteousness he was convinced.

Mr. Green's relation to this tragic and tremendous episode in American history has been mentioned for the purpose of affording at once an illustration of his high moral courage, both in encountering adverse public opinion in the discharge of professional duty, and in solving according to his own standards a vexed question of profoundly significant professional ethics; and the illustration well shows in both directions the mettle of his pasture.

But it is, after all, his love of learning, and his knowledge of the law which that passion of learning brought him, as exemplified in his writings and in the practice of his profession, upon which his fame must ultimately rest. Both in the pursuit of knowledge, and in its application when acquired, he evinced always and unfailingly the lofty spirit which is the very mark of a noble mind, whether in the endeavor of sport or of work:

Not the quarry, but the chase;  
Not the laurel, but the race;  
Not the hazard, but the play,  
Make us, Lord, enjoy alway.

He possessed the "long study, observation and experience," which Lord Coke pronounced essential to the ultimate equipment of the great lawyer; and it has been said of him, by the distinguished memorialist, who pronounced to his brethren of the bar at the time of his death a very fitting eulogy upon Mr. Green's wide and varied accomplishments, that "his reverence for the common law was equal to that of Lord Coke, but it was not marred by that illiberal prejudice against the civil law which has marked so many distinguished common lawyers. He delighted to draw wisdom from that great text, which has perpetuated the supremacy of Rome: *Non ratione imperii, sed imperio rationis.*"

As has been before intimated, Mr. Green's greatness as a lawyer found one of its potential factors in his devotion to his profession as a great science. His

wide acquaintance with law both as a rule of conduct governing human action, and as the interpretation of that rule through the administration of judicial tribunals, was in itself a reward that to him seemed abundant. Possibly his indifference to the pecuniary emoluments of his practice, as viewed from the standpoint of our more commercialized age, when the business of the lawyer has become largely the law of business, constituted a real defect in Mr. Green's make-up; for his financial circumstances at best were never more than moderate. But, up to the last, his delight in establishing a legal principle was always of a more genuine kind than that which arose from receiving a fee. At a time when he was quite a young lawyer, practising in the county court of Culpeper, he was known to tell a client who had come to his office for the purpose of paying him some money, that he did not have time to receive it, being very much engaged in the consideration of an interesting and important legal question; and that the client might take occasion to call again. Another client tells of him that he once employed Mr. Green as associate counsel in a case involving the settlement of an estate of some importance; and that when the business was in process of conclusion, and the personal effects belonging to the estate were sold, the associate counsel chose for his fee "a handy-volume copy of Cicero's works," suggesting that it was one which he could conveniently carry in his overcoat pocket, when he went to court on horseback.

Upon whatever question of law that was argued by him, either orally at *nisi prius*, or in his brief in the appellate court, Mr. Green, as may be inferred from what has been already said of him, seldom failed to enlighten the understanding of the judges. The black-letter doctrine of the mediæval text-writer or the latest decision of the Supreme Court of some American commonwealth alike served in his hands to shed a new and unaccustomed light upon the subject under his discussion.

Mr. William A. Maury, himself a learned and able member of the Virginia bar, has made an interesting comment upon Mr. Green's work in connection with a case that was argued by him in the Supreme Court of Appeals of Virginia, which serves to indicate the character of his legal arguments: Mr. Maury says:

Learned as were all his arguments at the bar, his most notable forensic effort was that made in the Court of Appeals in the case of Moon vs. Stone, 19 Grattan (Va.), 130, involving the question, whether a party claiming under a devise, took by purchase or as heir under the despotic operation of the rule in Shelley's case. It may be doubted whether this argument ever has been rivaled in acumen, nicety of discrimination, fullness and exactitude of learning, and depth and closeness of research. With the ease and confidence of a master he threads his way through the maze of clashing decisions which have rendered the labor of acquiring the learnings upon the famous rule in Shelley's case almost herculean, now educing order and harmony where minds less acute and less learned had found only hopeless dissonance and confusion, and now laying bare the errors and inaccuracies of imposing names, that never before had felt the shock of a criticism so fearless and so thorough.

It may not be generally known that a copy of this argument found its way to England, and was read there with admiration by judges of eminence.

There can be no higher or more satisfactory evidence of the remarkable merit of this argument than the order of the court at whose bar it was delivered, directing its publication in the Reports of the Court. It fills one hundred and twenty-seven pages of the 19th volume of Grattan's Reports, and will always be read and referred to with pride by the bar of Virginia.

Mr. Conway Robinson, the learned author of Robinson's Practice, sent a copy of Mr. Green's argument in the case of Moon vs. Stone to friends in England; and Mr. Justice Willes, upon reading it there, said of it that it showed a prodigious amount of industry and well-directed ability upon very difficult questions; while another distinguished law judge, Baron Bramwell, pronounced it "very remarkable, indeed;" adding, with unconscious humor, that it was "surprising that any one in America should have made himself capable of it."

Among his brethren of the American bar Mr. Green's erudition and ability had a wide-spread reputation. Mr. John William Wallace, who dedicated to him the third edition of "The Reporters," said of him: "His knowledge of law-books exceeded that of all the men I have ever known in England or America. It was wonderful, extending alike to what was in the books and what related to them." Mr. Conway Robinson designated his combination of legal and literary attainments as one rarely to be met with; and added that he had "such a knowledge of



the classics, as would have been appreciated in England in one of the great Universities." Mr. John Randolph Tucker said of him:

Mr. Green was a systematic and thorough student from his young manhood. He told me that all the ancient learning on treason, profusely cited in his petition for appeal in John Brown's case, was taken from his annotations on Hale's Pleas of the Crown, made when he was eighteen years old. Mr. Tucker adds, "No law question ever found him unprepared. In an instant, to any inquiry on the street, he would start the game and pursue it until captured. He knew some case bearing on it; and finding it, it referred to all that was needed."

It was a treat to be with him in a case; not always, to be against him. If with him, he liberally endowed you with all he knew; and not jealous of any point you might suggest, would lavishly and with generous zeal pour out upon you the cases which would uphold your new suggestion. He was a magnanimous ally. Again, if opposed to you, so loyal to the law was he, that he cited cases which you could utilize; though, while his candor impelled their citation, he would insist he could show they were not in accord with the weight of authority.

Mr. William A. Maury, in his address above mentioned, delivered upon the occasion of presenting to the Supreme Court of Appeals of Virginia the resolutions adopted by a large meeting, in Richmond, of the bench and bar of the commonwealth, in honor of Mr. Green's memory, quoted from a letter which he had received several years before from a very learned and accomplished member of the Philadelphia bar, as follows:

I have known him (Mr. Green) for more, I think, than a quarter of a century, and for much of the time was in frequent

correspondence with him. His learning in the law surpassed that of any man I ever knew. Sergeant Manning, in England, who was accounted the most learned man at the British bar, when I was abroad, had, I think, less. Withal, his mind is essentially logical in its modes of operation in the law, and I have rarely followed any argument of his to the close of it, and been able to say that I conceived it to be defective in reasoning.

The learning and research, which so distinguished Mr. Green's career, are but indifferently attested, in comparison of what possibly might have been demonstrated of them, by the *disjecta membra* of his published work, which are scattered here and there through the pages of many law periodicals, or to be found at sporadic intervals in the reports. Among the papers which he contributed to the "Virginia Law Journal" of his later day, then ably edited by Judge George L. Christian, were "An Essay on Lapse, Joint Tenants and Tenants in Common," "*Res Judicata*," "The Power of a Partner," "The Funding Bill," in relation to legislation bearing upon the subsequently much-litigated subject of the debt of the Commonwealth of Virginia; and "Editions of the Code." The *summum opus* of his life, in furtherance of which he had removed twenty years before his death from his country home in Culpeper to the state capital, where he might be near the libraries, was his "Practice." This work had its inception in the idea originally entertained by him of editing Buller's "*Nisi Prius*." It was yet unfinished, when death came and found him busy about it, as he had been for so long a time. What was left

in manuscript of the tremendous achievement, has been characterized by those who have examined it, as a prodigy of accurate and copious learning.

Mr. Green's mind seemed to reach out into the immensity of time no less than into that of knowledge in its undaunted contemplation of the magnitude of the work which he laid out for himself to do. Among other things which he proposed, he made preparation to edit the "Works of Lord Bolingbroke;" and advanced so far upon it as to write a sketch of his life and works. He entertained the idea of writing the history of the Executive, Legislative and Judicial Administrations of Virginia,—a task for which he was qualified beyond most of her sons, and which would probably have been carried out with the painstaking fidelity and philosophic impartiality which characterize the product of the great historians of the English Universities in the Nineteenth Century. Many notes were prepared by Mr. Green in preparation for this work,—which, yet unpublished and undigested, are contained in one of his manuscript volumes. He annotated the Reports of Barradall, Virginia's first reporter, which after many generations still remain in the unpublished manuscript, owned by the Virginia Historical Society;—the lofty tomb of whose author in the Bruton Parish Churchyard at Williamsburg is one of the most conspicuous objects to the gaze of the passer-by along the Duke of Gloucester Street in the old colonial capital. He contributed in 1880 an elaborate article on *Stare De-*

*cisis* to the American Law Review. He contemplated the preparation of a new edition of the "History of Virginia," which William Stith, President of the ancient College of William and Mary, had written upon the foundations of a beginning made by Stith's uncle, Sir John Randolph, Sir John being of the famous family of that name, and himself the King's attorney-general and a lawyer of no inconsiderable ability and renown. He prepared and printed for the use of his class at Richmond College, in the time of his brief occupation of the chair of law in that institution, an "Outline of the Principal Proceedings in Actions."

This recital embraces but a few of his works, either begun or finished; and a search would probably reveal in the legal periodical literature of America, from the time of his young manhood till his death, many contributions from his pen, that are now unknown even to those of his contemporaries who may survive; while the unprinted manuscript left by him is of a very voluminous character.

When it is remembered that in Mr. Green's time the modern stenographer and typewriter, who saves the general practitioner an immense physical labor, which the lawyer of the former generations was compelled to undergo, was unknown, his great industry and persistent energy stand out in bold relief against the background of all this work of study and composition, performed by him in the midst of a large and active practice in the courts. And to cap the climax

of his capacity for unceasing labor, he was the conveniently accessible and ever accommodating living encyclopædia of unusual knowledge, who was consulted by the literary and historical students of his acquaintance with as ready an inclination, as by those of his own profession who sought his illuminating opinion upon some question of law. To all such questioners he turned a prompt and willing ear; and often at cost of time, trouble and money, but always with generous alacrity, poured forth to them the abundance of his golden store.

His library has been described by one who knew it as a great room "with its cases packed with books on all the walls from the floor to the ceiling; with other cases running through the room longitudinally and diagonally, with boxes and trunks in the interspaces, leaving only narrow winding lanes between them,—a labyrinth to which he only had the clue, with which he could thread his way and put his hand upon the coveted book or manuscript, in the darkness of the night, as well as by the dim daylight."

It has been said of Mr. Green, that he was lacking, in a certain wise, in the creative faculty; and that his power of initiative and of original thought was dwarfed through the development of his taste for research and his extended acquisition of the knowledge of the books. However this may be, his ability and his achievements as a practitioner of law at no time up to his latter days gave evidence of any such defect. The learning which illumined all his

arguments was never wanting for a noble substructure of convincing logic.

Yet, after all is said, it is not upon his logic or upon the originality of his thought that his fame is destined to rest; but rather upon his marvelous knowledge of the great profession which he studied as a science, and practiced as a means of achieving human good. And as it may be safely averred that no other counselor so learned in the law has preceded him, at least within the borders of his own commonwealth, so it may no less safely be prophesied that none so learned is likely to come after him on that theater, upon whose stage he was for many years so conspicuous a figure.

At this present time, when the acquisition of wealth is often openly acclaimed the ideal of life and success is measured by measures of gold; when the old watchwords of enthusiasm and of devotion do not ring so loud as once, perhaps, in the ears of the world, it may be not without value for those of us against whom the materialism of the age beats hard, to freshen our hearts for a moment now and then with the contemplation of so noble a figure as that of William Green; and to hope for those who shall come after us, in the work which we are now doing, that his lofty example may inspire them to high ideas; and that wherever they may fall on aught that is equivocal or base, it may form and mold them anew.



SAMUEL AMES.





SAMUEL AMES

From a painting by Hugo Br<sup>ue</sup>l in the Supreme Court Room at Providence, Rhode Island.







## SAMUEL AMES.

1806-1865.

BY

JOHN HENRY STINESS,

*ex-Chief-Justice of Rhode Island.*

**T**O Samuel Ames has worthily been accorded the title of the great Chief-Justice of Rhode Island. He was distinguished as a lawyer, legislator, law writer, and jurist. To him more than any other is due its judicial system, for to him it fell to establish the principles of fundamental law in relation to branches of the government, in a way both to settle great questions in the state and to disclose the rare ability, learning and character of the Judge.

He was born in Providence, September 6th, 1806; the son of Samuel and Anne (Checkley) Ames. He was prepared for college in the public schools of Providence and in Phillips' Academy, Exeter, New Hampshire, entering Brown University at the early but not then unusual, age of thirteen years. He graduated in 1823, and entered the office of Samuel W. Bridgham as a law student. He spent a year in the law school of Judge Gould at Litchfield, Connecticut, and was admitted to the bar when he was but twenty years of age. He entered upon the prac-

tice of law in his native city. Of this period of his life, Mr. Samuel Currey, speaking of his genial and exuberant sociability, his vivacious and playful temper and his great acquirements, literary, scientific, and historical, says: <sup>1</sup>

He loved to talk. There was no subject of general knowledge that he did not love to pursue. I think I never knew a man, at the age of thirty years, so well read in literature and in history, as the late Justice was at that age. He delighted in the best English classics, prose and poetry. He was profoundly read in English history. He could tell you at any moment of the rise and fall of the Regal Houses of England; he could tell you of the rise and fall of the ducal and baronial houses of England and he could tell any one at any time, all about the constitutional history of England. He had traced its progress through all the storms of the Civil War in that country and he understood it well.

Mr. Abraham Payne at one time his partner, also speaking of his earlier days at the bar when they boarded together, says: <sup>2</sup>

It was our delight to listen to Mr. Ames. His talk took a wide range over subjects grave and gay. He was equally at home on questions of literature, law and theology and, in lighter moods, whether in sarcastic vein or of more genial humor, he was irresistible. He was then superintendent of the Sunday School of St. Stephen's Church and as he started of a Sunday morning in his heavy lion's skin overcoat with his Bible under his arm, for his duties at the school, he reminded me of those churchmen of the middle age who, though not unmindful of the duties to which they were especially consecrated, were yet more at home when intrusted with the command of armies.

<sup>1</sup> From the remarks of Samuel Currey in his obituary address to the court, reported in 8 Rhode Island Reports, 583.

<sup>2</sup> Reminiscences of the Rhode Island Bar, by Abraham Payne.

The connection with St. Stephen's Church, mentioned by Mr. Payne, he retained throughout his life. For years he was a vestryman, faithful in that as in all other things, a cordial supporter of all benevolent efforts.

The mark he made as a young lawyer is best attested by the fact that in 1832, when he was but twenty-six years old, he was selected by Joseph K. Angell to assist him in the preparation of the work so well known as Angell and Ames on Corporations, which became and has remained a standard authority.

No better training could be given to a young lawyer than in work under Mr. Angell. He was one of the most learned and extensive law writers, not simply of Rhode Island but of his time. His works embraced the subjects of Water Courses, Right of Property in Tide Waters, and in the Soil and Shores thereof; Incorporeal Hereditaments by adverse enjoyment; Right of state to tax a body corporate; United States Law Intelligence; Limitations of Actions; Assignments for benefit of creditors; Carriers of Goods and Passengers by land and water; Fire and Life Insurance and Highways. The work on corporations and that on limitations were widely known. The treatise on corporations passed into many editions, being greatly enlarged and practically rewritten by Mr. Ames.

During the so called Dorr Rebellion in 1842, although Mr. Ames was the brother-in-law of Mr.



Dorr, he served as Quartermaster-General of the state troops. He was several times a member of the city council of Providence and of the House of Representatives, and in 1844-5, was the speaker of the House. As a legislator he naturally took a leading part, and there, as well as in courts and public assemblies, he was recognized as a most prominent, brilliant, convincing and delightful speaker. His professional duties, however, claimed so much of his time that he did not enter largely into political matters.

Very little can be gleaned in regard to the practice of lawyers of Mr. Ames' day in Rhode Island, except in the manuscript records, for the reason that the Supreme Court sat *in banc* in the trial of jury cases and gave the rulings of the full court during the trial. Charges being then the utterance of the full court had the weight of opinions. Only in rare cases therefore, were questions raised for review, or written opinions given. A reporter was not appointed until 1847 when Mr. Angell was made the first reporter and he gathered into the first volume of the reports the few written opinions that could be found. Prior to 1850 only thirty-three opinions and six charges are reported covering a period of more than twenty years. Indeed, down to 1827 no opinions or charges were given by the court at all, for the juries were judges both of the law and facts. Then an act was passed making it the duty of the court to instruct the jury in the law. Enough appears, however,

in the reports, meager as they are, to show that Mr. Ames was engaged in most of the important litigation and it is well known that he had a large and lucrative practice, both in and out of the state. He frequently appeared before the Supreme Court at Washington and was associated with or against Webster, Curtis, Mason, and other leading lawyers. He was a ready, fluent speaker, thoroughly versed in the principles and rules of law, and unusually familiar with English cases and practice. Mr. Currey, in his remarks at the death of Judge Ames, reported in the 8th Volume of Rhode Island Reports, said that some lawyers from the south at Washington were once comparing northern and southern speakers, claiming that the former were cold and heavy, without spirit, vivacity, or eloquence. Upon this Governor McDowell of Virginia said: "No, gentlemen, I have been listening for the last two or three days to a young man from Rhode Island. He knows all the law from Doomsday book to the present time and has it all by heart and he can talk like a Virginian." Governor McDowell was himself a distinguished lawyer, and, allowing for southern exuberance of expression, his remark sufficiently shows that Mr. Ames' ability as a lawyer and an orator were of no ordinary quality.

In those days, when there was no rule limiting arguments to the short time now made necessary by the press of business, oratory had a larger place in trials, though under present conditions, it has be-

come a lost art in the profession. Argument has supplanted oratory. While, doubtless, there has been a great gain in reducing the examination of cases to the basis of pure reason, there is little opportunity for the lawyer, capable of adorning his argument with the charms of rhetoric, to persuade by pleasing. To law as a science, this is of great advantage, for judgment must now be sought upon the basis of strict law and justice, rather than lured by the spell of fascinating presentation. Nevertheless, the power of Judge Ames as an orator is to be taken into account in estimating the ability of the man.

With Judge Ames the power of persuasive speech did much to establish his reputation and standing as a lawyer. But his ability as a lawyer did not rest upon this alone. His taste led him to go thoroughly into the law as a science and he followed it, *con amore*, from its ancient sources through the English courts to its application in this country under different conditions. Added to this, his training as a law writer induced the judicial habit and made him a well grounded, well rounded and fully equipped jurist.

In October, 1854, he was chosen by the General Assembly as Chairman of a Commission to revise the laws of the state. Report was made in 1857. This revision was the first orderly and scientific arrangement of the laws, grouping them under titles and chapters in a way that has since been followed. Numerous and valuable changes were adopted, no-

tably in laws relating to corporations, highways, public printing, taxation, registration of births, deaths and marriages, construction of statutes, property of married women, etc. The work of Judge Ames and his associates entitles them to a high place as codifiers.

In 1855 Brown University, his Alma Mater, conferred upon him the degree of Doctor of Laws. On August 11th, 1856, he entered upon his duties as chief-justice of Rhode Island.

Upon his election as chief-justice, Judge Ames was made the reporter of the decisions of the court and his reports fill the fourth, fifth, sixth, and seventh and a part of the eighth volume of Rhode Island Reports. A comparison of those reports with the preceding three volumes and indeed with other reports of that period, show that his were compiled by a master hand. Before his election the salary of the chief-justice had been \$1600 a year and that of the Associates, \$1500 each. In order to make it possible for him to accept the office, the salary was raised to \$2500 with the office of reporter at a salary of \$500.

The reasons for his acceptance of a judicial position were given by Judge Brayton, senior associate of the bench of Rhode Island when Mr. Ames was elected chief-justice; in responding to the resolutions of the bar upon the death of the Chief-Justice, Judge Brayton said:<sup>3</sup>

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<sup>3</sup> 8 Rhode Island Reports, 588.

He had an earnest desire to do justice and to administer justice and took a pleasure in being occupied on the bench in its administration. In a conversation with him upon the matter, I said to him:

"I wonder that a man of your standing at the bar should have assumed a place upon the bench, where your emoluments will be so much less and your labor so much more." "My dear sir," said he, "I never designed to continue at the bar all my days. If I continued practise to the age of fifty years, I did not design to continue it longer. I do not like to be at the bar. I do not desire to be compelled to make the worse appear the better reason. I wish to pursue the better reason."

With all his success as a lawyer, he had the true spirit of a judge. He entered upon the duties of chief-justice of the Supreme Court of Rhode Island, August 11th, 1856, and he held the office until his death, December 20th, 1865. In order to appreciate fully the great service which he rendered in that office by his instructive and formative judgments, a brief review of the judicial history of the state is necessary.

Like the other New England colonies, Rhode Island started with the legislature as the General Court, and it so continued. An early act of the legislature in 1708 shows both insistence upon this practice and amusing naïvete. Referring to the action of the Assembly in the Chancery suit of Remington vs. Brenton, "Wherein the proceedings of the Assembly were utterly condemned by Her Majesty and Council," the Act authorizing the Assembly to be a Court of Chancery was repealed, and a regular Court

of Chancery was ordered, always provided the said appeals may be by way of petition to this or any other Assembly in this Colony.

The Assembly evidently believed, "A rose by any other name would smell as sweet."

In "Gleanings from the Judicial History of Rhode Island" the late Chief-Justice Durfee says:

Originally the general assembly seems to have considered itself a court as well as a legislature, and in its proceedings it often denominated itself a court. As a court, however, its action, though in some sense judicial, was not so purely so as that of ordinary tribunals, but was often tempered with some admixture of legislation. In fact the assembly was very frequently petitioned not to enforce but to modify the law in the particular case or to make it specially for the case, or to remedy some defect in it, or to help the petitioner get over the legal consequences of some mistake or omission of his own. It thus sat as a court to dispense justice, not according to law but according to equity, and according to equity in the popular, as distinguished from the judicial meaning of the word. The records are full of illustrations of the jurisdiction.

Among these illustrations we may note divorces, which were granted by the assembly down to 1850. New trials were also granted, sentences in criminal cases annulled and acts of a probate nature passed. In the celebrated case of Trevett vs. Weeden in 1786, the superior court declared void an act of the general assembly, which authorized the conviction, upon a trial without a jury, of one who should refuse to take the paper money of the colony. The court held the act to be contrary to the rights of citi-

zens under *Magna Charta*. The assembly immediately summoned the judges upon an order in the nature of impeachment. After hearing the judges the assembly voted that it was not satisfied with the reasons given by the judges for their judgment. Although the colony had no constitution the judges based their action on the principles of the common law, which gave to every English subject a right of trial by jury, and the common law being the underlying law of the colony, the right followed to citizens of this country, notwithstanding its independence of English sovereignty. When the question of their removal from office came up it was voted: "that as the judges are not charged with any criminality in rendering the judgment in *Trevett vs. Weeden* they are discharged from any further attendance upon this assembly on that account." The desired result, however, was quickly reached in another way. The judges held office under a yearly tenure and when the next election came the assembly chose others in their places.

Without multiplying instances, it is enough to say that the exercise of what was really appellate jurisdiction by the legislature continued down to 1856. At first the governor and the assistants, who were a part of the legislative branch of the colony, were constituted a final court of review. This evidently was for convenience, for the colony was too small and too poor to establish courts in its beginning. None of the early colonists are known to have had a

legal training and the governor and assistants were as good a court as the colony could then provide. They heard cases in the several towns, but when the assembly was in session the cases were determined by the entire body. The governor and assistants were a court *ad interim*, when, with the scant facilities for traveling, not the whole assembly could attend.

The constitution adopted in 1843, superseding the charter of King James II, contained this provision:

The judicial power of the state shall be vested in one supreme court and in such inferior courts as the general assembly may from time to time ordain and establish.

It, also, contained the provision:

The general assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution.

Under this latter clause it was assumed that the exercise of judicial power by the assembly continued as before. And so it did in fact. Petitions for relief of various kinds were presented and acted on; chiefly, insolvent petitions and petitions for new trials. Still the incongruity of such procedure with constitutional government, as established by the several states, was growing more and more apparent, as time went on, and finally the question of the right of the legislature to exercise judicial functions came up squarely for decision.

Before the present constitution, suffrage in Rhode Island was confined to land owners and their eldest sons. Much effort had been made, through many



years, by way of petition to the assembly, for an extension of the suffrage and a more equal representation, without avail. Inconsistent as relics of feudalism and primogeniture were with American ideas, it was natural that those who held the power should be unwilling to surrender it. In 1841, however, the assembly called a convention to frame a constitution, which was afterwards submitted to the electors and rejected. Then came by popular movement a convention which framed what was called the People's constitution. It was submitted to a popular vote and so adopted, without legislative sanction. For attempting to act under it as governor, Thomas W. Dorr was tried and convicted of treason and committed to prison in 1844 under a sentence for life. In 1845, under a general act of assembly, Dorr was released from imprisonment, he, however, being the only one imprisoned. In 1854, the assembly passed an act declaring that "the judgment of the supreme court, whereby Thomas Wilson Dorr, of Providence, on the twenty-fifth day of June A. D., 1844, was sentenced to imprisonment for life, at hard labor, in separate confinement, is hereby repealed, reversed, annulled and declared in all respects to be as if it had never been rendered," and directing the clerk for the county of Newport to write the same across the face of the record of said judgment.

At the following June session the assembly requested an opinion of the supreme court upon the constitutionality of the action of the preceding as-

sembly. The opinion is reported in third volume Rhode Island Reports.<sup>4</sup> The court then consisted of Chief-Justice Greene and Justices Haile, Staples, and Brayton. The opinion stated that the act was an exercise by the general assembly of supreme judicial power; that it purported to repeal, annul and reverse a judgment of the highest court known to the constitution, and to declare it to be in all respects as if it had never been rendered. The opinion then went on to state that the provision of the constitution, vesting one department of the government with the legislative and another with the judicial power of the state, vested each with exclusive power in its appropriate sphere. The judge referred to Article IV, of the Constitution, relating to legislative power. (Section 10) which provides:

The general assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution.

Obviously, the judges held that this was not intended to confer or to continue the judicial power which the assembly had exercised before the constitution, because, being under the heading of "Legislative Power," the presumption was that it related only to legislative power and that "if so extraordinary a grant was intended as of judicial power that term would naturally have been used."

The opinion of the judges was clear and sound as

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<sup>4</sup> Page 299.

to the question propounded and directly in line with the recognized distribution of powers throughout the country. Had the opinion stopped there, the occasion for Judge Ames to distinguish himself in settling the entire question would probably never have arisen. The judges, however, added that as the assembly had granted new trials in suits at law and heard and decided appeals from the judgments of the supreme court on insolvent petitions both before and after the adoption of the constitution, which practice had been acquiesced in by the people, they would not say that the exercise of power, to that extent, might not be valid, "upon the ground of construction by acquiescence and the danger to titles from now disturbing it;" but as the main question involved an indictment, and not a suit at law, it was not within this saving clause.

The effect of this astonishing fallacy was to continue to the assembly the power to reverse the judgments of the supreme court in certain cases, some of which might, possibly, deserve relief, but most of which depended for success upon political influence, personal regard or *ex parte* presentation. The question of ultimate jurisdiction, therefore, was not settled, for "no question is settled until it is settled right."

At the January session of the assembly in 1854, a resolution was passed reopening a case, which had gone to judgment, by authorizing garnishees, who had made a disclosure of funds of the defendant in their hands to file new affidavits and staying pro-

ceedings in a suit brought by the plaintiffs in the original action against the garnishees. The question of the constitutionality of this action of the general assembly was raised and it came before the supreme court in September, 1856, very soon after Judge Ames entered upon his duties as chief-justice. The judges at that time were Ames, Brayton, Bosworth, and Shearman. Judge Brayton was one of the judges who joined in the opinion on the Dorr act. The case was *Taylor vs. Place*,<sup>5</sup> and the opinion by Chief-Justice Ames covers thirty-four of the printed pages of the report. He first referred to several cases in the supreme court of the United States, in illustration of acts which were not the exercise of judicial power and were, therefore, within legislative jurisdiction; and then to other decisions defining what was within judicial jurisdiction.

He laid down the proposition, fortified by these citations, "that to hear and decide adversary suits at law and in equity, with the power of rendering judgments and entering up of decrees according to the decision, to be executed by the process and power of the tribunal deciding, or of another tribunal acting under its orders and according to its directions, is the exercise of judicial power in the constitutional sense; and this is so whether the decision be final or subject to reversal, on error or appeal."

He pointed out that the vesting of judicial power in the supreme and inferior courts in the constitution

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<sup>5</sup> 4 Rhode Island Reports, 324.

of Rhode Island is the same as that of the federal constitution and should be taken and regarded as the latter has been defined and settled, extending to "all cases in law and equity arising under this constitution," etc. "To interfere with this jurisdiction; to disturb and control the exercise of power; to take the case of the settled course of judicial proceedings in that court; to set aside its verdict; to open its past judgment and to give the defendants leave to amend affidavits was, therefore, not only the exercise of judicial power on the part of the general assembly over this court and case, but of judicial power of the most eminent and controlling character." Continuing he pointed out the incongruity of uniting in a free state, the legislative and judicial functions, for such a course so centralizes, instead of distributing, power as to make the legislature absolute in authority and autocratic in judgment. He admitted that since the adoption of the constitution the assembly had exercised judicial power.<sup>6</sup> Usage under the

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<sup>6</sup> In illustration the extent of the exercise of such power by the general assembly, before the adoption of the constitution, he referred to the argument of John Whipple in *Wilkinson vs. Leland* (2 Peters' Reports, 631), heard before the Supreme Court of the United States in 1829, that the assembly had always exercised supreme legislative, executive and judicial power; that, by one of its laws, it was authorized, upon petition for new trial, to set aside the judgments of its courts at pleasure; that having been originally the only court in the state, it had exercised common law, chancery, probate and admiralty jurisdiction and never had parted with its chancery powers, being, as the counselor said "the best chancery court in the world."

Mr. Webster argued in the same case, that by the constitution of the United States every state must be a republic and must have a judiciary,

constitution could be resorted to only in cases of doubtful interpretation and the question before the court was not doubtful in the slightest degree, nor was the practice entitled to weight.

Judge Ames further cited the various provisions of the constitution, relating to the distribution of powers, to show that the power which, under the charter, had been aggregated in the general assembly, had been distributed by the constitution among appropriate departments; that thus a just balance of power might obtain among all and that just as the constitution conferred *all* legislative power on the general assembly, so also it gave all judicial power to the courts established under it, as in the federal constitution.

legislature and executive, or it has no constitution. The powers of a court and legislature cannot be blended. He asked could a writ of error issue from the supreme court of the United States to the legislature of Rhode Island? He called the act in question "*fiat* legislation" and said that the powers exercised by the Rhode Island legislature were beyond those of the English parliament.

Judge Story in the opinion of the court said that the charter of Rhode Island reserved to the people the rights under the general laws of England and that the great principles of *Magna Charta* could not be disregarded. In any event, however, after the revolution it could scarcely be imagined that that great event left the people of that state subjected to the uncontrolled and arbitrary rule of the legislature. The act in question confirmed a sale of land, by an executrix in New Hampshire for the payment of the testator's debts. The act was held to be valid, because, by the laws of both states, the land was chargeable with the debts of the decedent and, therefore, the act was not a judicial act, but remedial legislation to establish a right. In a note to the report twenty cases, between 1773 and 1791, are cited, covering new trials granted, amendment of judgment, increasing amount of judgment, removal of case to another county, settlement of estate, sale of real estate, etc., by acts of assembly.

Referring to the opinion of the judges as to the Dorr matter, he said:

We are satisfied that the reasoning, in the former part of the opinion, from the purpose of the distribution of the governmental power under the constitution, that the exercise of judicial power was prohibited to the general assembly, is unanswerably correct. If the latter part of the opinion is to be construed as reserving to the general assembly ordinary judicial power in granting new trials in actions at law; or chancery powers, to be applied by the assembly in pending cases, or, in any judicial mode, to cases of accident or mistake; or as anything more than that, in the matter before them, they had no occasion to meddle with that question. It was not only wrong, but logically at war with the only ground which they state for their first conclusion.

The result in *Taylor vs. Place* was that the act in question, granting a new trial, was unanimously declared unconstitutional and void.

In view of the long-continued practice we can see that the opinion would be a startling one to the people of Rhode Island. The legislature was a popular idol, because all classes had come to regard it as preëminently the voice of the people and because they had found it so easy "to get a little act passed" in an emergency, instead of applying to the court, which was regarded as an arbitrary and unaccommodating tribunal. People are liable to yield to long established usage and so it was not strange that even lawyers of eminence, like John Whipple, should come to consider the assembly as "the best court of chancery in the world." The stronger a man is, the greater antagonism he is liable to arouse.

Judge Ames knew full well that his opinion would not meet with popular favor. Cogent as was his argument, it was at first regarded as the sophistry of a skillful lawyer, who was enlarging his powers as a judge.

Settled popular opinion does not die out easily. While the decision was acquiesced in for the time, to the extent that no formal opposition was made to it, yet

He that complies against his will  
Is of the same opinion still.

So in speeches and newspaper articles the decision was criticized as a usurpation of power by the court. It was declared in one newspaper article, to be a decision "to the surprise of ninety-nine in the hundred of the adult population of Rhode Island," which "by express rulings wrested from the general assembly all those judicial and *quasi* judicial powers which it had always exercised." The opinion was stigmatized as extra judicial and the reasonings as "ridiculously unsound." It required courage and supreme conviction on the part of Judge Ames to overthrow these settled ideas of the people, but he was equal to the emergency. It was the opportunity of a strong man and he bravely met it. He was in a position of responsibility and he could not surrender his conscience to popularity. As with all true reformers his reward came at last, not at once.

Ignoring the decision in *Taylor vs. Place*, in 1859, a petition was presented to the assembly to annul the



decree of the supreme court in the case of Ives vs. Hazard. This was a bill for the specific performance of a written contract for the sale of land, decided in favor of the complainant. The petition was referred to a special committee, of which Charles C. Van Zandt, then a young lawyer, and later governor of the state, was chairman. The committee held that the court had only such equity powers as the assembly conferred upon it; and that the residue remained in the exercise of the assembly. Accordingly they unanimously reported a resolution that the supreme court, in assuming equity jurisdiction in the case, exceeded the authority conferred upon it by the general assembly and that the proceedings in said case should be wholly amended, resolved and annulled and the complainant left to seek his remedy before a court of common law in conformity with the requirements of the constitution and laws of the state.

Evidently the old notion was "scotched, not killed." The state was flooded with pamphlets and newspaper articles. The Legislature was loath to give up the prerogative it had exercised so long. Nevertheless the opinion in Taylor vs. Place was too strongly fortified by its reasoning, by the common understanding of judicial jurisdiction in other states and by the practice and decisions of the supreme court of the United States to be overthrown. The opponents hesitated before it. The committee's position was so weakened under the ponderous,

sledge hammer blows of Thomas A. Jenckes, then, fortunately, a member of the assembly, afterwards a member of congress and author of the bankruptcy and civil service reform acts, that they dared not press their resolution to a vote, but allowed it to lie over until 1860, when it was indefinitely postponed. Thus, slowly, but surely, Judge Ames' opinion overcame opposition and prevalent notions based upon long usage and fixed the lines of legislative and judicial jurisdictions. He won the concurrence of the state. Such a service and such a triumph is probably unique in the judicial history of our country.

In an obituary of Judge Ames in the *Providence Journal* of December 23d, 1865, it was fitly said:

Taylor vs. Place was a small case in itself, in substance: Whether a garnishee should be permitted upon a new trial in a case where adverse judgment had been rendered upon affidavits made under mistake; but in its scope it was as great as any that Holt ever tried and struck at the foundations not only of our judiciary but of the constitution and of free government itself. It was of incalculable importance that just such a judge as the late chief-justice should have presided at that trial and have reared the beacon in his luminous opinion, which will shed its warning and guiding light through the coördinate departments of our government, while they endure. The real parties were the legislative and judicial departments of the state, and the legislature was the assailant. It needed courage that men could not shake; learning and philosophy and enlightened freedom that could not be obscured; independence that power and hostility could not make waver a hair's breadth; and calmness and moderation that could not be disturbed, to make that opinion what was

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needed and what it is. In building this bulwark for our real liberties, the chief-justice was unconsciously erecting a monument for himself, and when the citizens of this state in the future shall recall, as they will, the peril in which the judiciary, the people and the constitution were placed, they will gladly recognize the imprint of courage, learning and wisdom which Judge Ames left in their defense.

But while this was his most notable service as Chief-Justice, it was by no means his only work of unusual importance. In 1854, an act was passed for the opening and widening of the streets in the city of Providence; usually called "The Betterment Act." It allowed a special assessment for a proportion of benefits to property taken and to neighboring lands receiving special advantage from the improvement. The first case under the act was the opening of Dorrance street in Providence, now one of its most important thoroughfares. Back lands which would open on the new street and other land made more accessible were assessed for benefits and the owners claimed that such an assessment was unconstitutional, because it was virtually taking private property, their money, for a public use and because it unfairly distributed a public burden.

Judge Ames, in his opinion, pointed out that this was not taking or seizing under the constitution, but a form of taxation authorized by the constitution and none the less so because it was a new form of tax; further that it was within the provisions of the constitution that the burden of the state ought to be fairly distributed among its citizens. Fairness is

not necessarily equality, and where the value of an estate has been doubled or quadrupled by an improvement the owner should pay at least a part of the value which he receives from it. Arguing from the maxim "*Qui sentit commodum sentire debet onus*," he said: "The tax is assessed upon the estate in proportion of the benefits, if any be received, to equalize and render more fair the distribution of the burden caused by the improvement." The opinion was so persuasive that it silenced opposition to the law and the principle of the act has since been extended to all the towns and cities in the state.

Another opinion, which has frequently been cited by other courts was that of *Ditson vs. Ditson*.<sup>7</sup> This was a petition for divorce by a wife claiming a domicile in Rhode Island, the husband's domicile being in Massachusetts. The occasion for an opinion in the case was the fact that the Supreme Court of Massachusetts in *Lyon vs. Lyon*,<sup>8</sup> had declared void a decree of the court in Rhode Island and thereupon granted a divorce to the husband, a resident of Massachusetts. The prior Rhode Island divorce was declared void, partly upon the ground that it was a proceeding in fraud of the law of Massachusetts, the residence of the wife in Rhode Island not being a *bona fide* residence, and partly because the court of the foreign state (Rhode Island) could have no jurisdiction of the subject matter and both of the

<sup>7</sup> 4 Rhode Island Reports, 87.

<sup>8</sup> 2 Gray's Reports, 260.

parties upon general principles of law. As to the finding that the wife's residence in Rhode Island was not *bona fide*, upon the facts adduced before the court in Massachusetts, Judge Ames agreed; but he disagreed with the statement that a court could have no jurisdiction in case the wife should be a *bona fide* resident of Rhode Island, because it could not have jurisdiction of *both* parties. In other words, the question was whether a wife could gain a residence apart from her husband in a state entitling the courts of that state to take jurisdiction of her petition for divorce. As to this question Judge Ames differed with the court in Massachusetts and his opinion was that which has become the generally, if not the universally, accepted rule. He claimed that jurisdiction did not depend upon the subject matter as something distinct from jurisdiction over both parties, and showed that the Massachusetts court, in referring to *Barber vs. Root*,<sup>9</sup> in which stress was laid upon the place of the contract and the place of violation of it, as affording or not affording ground of jurisdiction, overlooked *Hanover vs. Turner*,<sup>10</sup> and *Harteau vs. Harteau*,<sup>11</sup> which rejected "both these false and confusing notions."

In the latter case Chief-Justice Shaw declared that the place where the marriage was performed seems to be of no importance; also, the place where

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<sup>9</sup> 10 Massachusetts Reports, 260.

<sup>10</sup> 14 Massachusetts Reports, 227.

<sup>11</sup> 14 Pickering's Reports, 181.

the act in breach of marital duty was done did not affect the question of relief; thus disposing of the theory that the court must have jurisdiction of what was called the subject matter in *Lyon vs. Lyon*. The court held that while the general rule is that the domicile of the wife follows that of her husband, it will not be applied to oust the court of jurisdiction in the case of a wife applying for a divorce; but divorce will not be granted when the act complained of was not a ground of divorce in another state, where the parties resided at the time.

The lucid showing by Judge Ames that a wife may have a domicile apart from that of her husband was a complete answer to the decision in *Lyon vs. Lyon* that the Rhode Island divorce was void under general principles of law, for want of jurisdiction of the subject matter and of both the parties.

There are many opinions of Judge Ames well worthy of examination if space permitted, such as *Wilson vs. Conway*, and *Hampden Fire Insurance Co.*,<sup>12</sup> on warranties in policies of insurance; *State vs. Paul*, and *Keeran*,<sup>13</sup> on the constitutionality of the prohibitory liquor law; *Beckwith vs. Howard*,<sup>14</sup> on rights in gangways; *Hunt vs. Pratt*,<sup>15</sup> on the scope of an action in trespass. In style his opinions were clear, forceful, succinct and comprehensive; showing familiarity with leading English and American cases

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<sup>12</sup> 4 Rhode Island Reports, 141, 159.

<sup>13</sup> 5 Rhode Island Reports, 185, 497.

<sup>14</sup> 6 Rhode Island Reports, 1.

<sup>15</sup> 7 Rhode Island Reports, 283.

and a firm grasp of fundamental principles. As a rule they were brief, but the length of some was due to the necessity of a full discussion of the questions involved and to the fact that the reports of the state began so late that reference could not be made to previous decisions of the court.

A notable service rendered by Judge Ames was the introduction of more orderly procedure under new and adequate rules of practice. Before his time, when the court sat *in banc* in all cases, few rules were needed, as questions of procedure could be decided as they arose. Rules had been adopted but they had become inadequate and a new system was framed which has, with slight alterations, continued to the present time. The principal feature of the new rules was the conformity of proceedings in equity to the English chancery practice, with which Judge Ames was very familiar. Previously, equity proceedings had been of a rather primitive character, somewhat after Selden's analogy to the length of the chancellor's foot. In many of his opinions he expounded the law of equity, revealing its solid foundations and its ordinary procedure.

Before he came upon the bench most of the important cases, on any pretext which could be found, were brought or taken to the federal court. Judge Story, the leader in equity in this country, who at the unusual age of thirty-two years had been appointed a justice of the supreme court of the United States, then presided in the Eastern Circuit. It is

not strange, therefore, that his court was a favorite forum and that it should so continue under Woodbury. After the election of Judge Ames there were fewer cases in the federal court and a notable increase in the state court, because of the faith in his judicial ability. He established the court in public confidence upon a foundation which happily still remains.

In 1861, desirous of doing what he could to avert the Civil War, and believing that, in view of such a disaster, both sections would listen to the voice of reason and join in some mutual peaceful agreement, he left his judicial duties for a time to attend, as an appointed delegate from Rhode Island, the meetings of the Peace Congress in Washington. He was not moved by timidity, for he ardently supported the prevailing sentiment of the north, but by a desire to avert, if possible, a fratricidal contest. After the strife was on, too far advanced in life himself for a soldier, he gave his three sons to the support of the government; Lieutenant Sullivan D. Ames in the navy, William Ames in the army, afterwards Colonel of the 3d Rhode Island Artillery and Brevet Brigadier General, and Samuel Ames, a cadet in the Naval Academy.

In 1864, though only fifty-nine years old, his health began to be seriously impaired. Nevertheless he continued at his post unremitting in labor until November 15th, 1865, when he sent in his resignation as Chief-Justice to the Governor, to be



communicated to the general assembly at its approaching January session. It was hoped that rest might bring recuperation; this, however, was not to be. On December 20th, 1865, before the meeting of the general assembly, to which his resignation was to be presented, after a service of nine years and four months upon the bench, the end came.

A simple glance at his portrait shows at once the strength of character in the man. Strong men are liable to the hostility both of those who cannot and those who will not see the strength of their positions. This is peculiarly true of judges. One who gets a decision in his favor thinks that his case required no keen insight nor careful study, for the justice of it was so plain that it could not have been decided otherwise; and those who lose usually think it must have been because of favor, incompetence or even dishonesty. So Judge Ames was assailed for attempting, in *Taylor vs. Place*, to magnify his office and to assume power which belonged to the representatives of the people. Happily this charge finally died from its own weakness.

As reporter of the court, however, he did not escape trouble. The case of *Ives vs. Hazard*, in which he had been counsel had been decided for the complainant just before Judge Ames went upon the bench, so that the report of the case went over into his time as reporter. As usual, he stated the facts as they appeared on record and Hazard petitioned the General Assembly, not only for the reversal of

the decree and for a new trial as heretofore explained, but complained that he had been slandered by the report of the case and that the reporter had given a copy of the report to the complainant before the volume of the reports had been published. The matter was referred to a joint committee of the senate and house. Judge Ames appeared before the committee in person, saying to his friends, that when his honor was called in question he would intrust his defense to no one but himself. He showed the record of the case to the committee and also stated that a copy of the report had been requested by and given to the complainant after it was in print and before the volume was published. The committee unanimously exonerated him from the charge of an improper report and also stated that he had properly given the copy to the complainant on request and would have been censurable had he refused it to either party. The petition was laid upon the table by a very decisive vote.

In social life Judge Ames was a most charming companion. Well versed in literature and general knowledge, sparkling and quick-witted in conversation, familiar with current affairs and holding well balanced opinions, he was a welcome addition to any gathering. So kindly in his nature, unlike many strong men, he was greatly beloved by all who knew him. He made friends more than enemies. He was a liberal reader and had a fine English style. His favorite amusement was whist and he is re-

ported to have adopted the remark of the English judge who said: "The two greatest pleasures of life were to sit at *nisi prius* all day and play whist all night."

Judge Ames was most kind hearted and considerate. The request of a law student for information was as courteously replied to as if it had come from a leader of the bar. He did not purposely offend, though it is true that he could not always patiently endure.

In his reminiscences of the Rhode Island Bar, Mr. Abraham Payne, once a partner with Mr. Ames, in a brief sketch said: "A more honorable man I have never known. A more learned lawyer I have never known or read about. A judge more anxious to do his whole duty never adorned any bench. No man had stronger or more tender affections. Burke said of his friend Lord Keppel: 'Though it never showed itself in insult to any human being, Lord Keppel was somewhat high.' I have often thought of this expression in connection with Mr. Ames. With his peculiar temperament it was difficult, at times, to be entirely just in the contest at the bar or when listening wearily on the bench to the endless tongues of lawyers. But no man had a kinder heart, or felt more keen regret, when he knew he had wounded the feelings of another man. On one occasion when I told him that an old member of the bar was hurt by something he had said, the tears came into his eyes as he said: 'Poor fellow; I am

afraid he has reached the time when the grasshopper is a burden,' and immediately went to the man and made an ample apology."

Thomas à Kempis said: "Occasions do not make a man frail, but they show what he is." The converse is equally true, they do not make a man strong, but they show what he is. Men are judged by what they have done; not what they might have done. So opportunity is a large factor in fame. Doubtless other generals than Grant might have driven Lee's failing forces to surrender, but he did it, and he stands out in our history as the great commander. Other men than Dewey might have battered the Spanish ships at Manila, but he was honored as the great admiral. So in according to Judge Ames the title of the great Chief-Justice of Rhode Island, there is no disparagement of the ability of others to whose lot it did not fall to give decisions which should settle the fundamental relations of the government of the state, or to be the one to organize and establish the judicial system upon a modern and scientific basis.

All the present members of the Rhode Island bar will call to mind the name of one who would stand very close to Judge Ames in ability and in grasp and application of the law; a thorough scholar; a fine writer of poetry and prose and a diligent student of the history of the state, leaving many valuable contributions in that line. Chief-Justice Durfee left many valuable and important opinions, but the

occasions did not happen to give them the formative character of those which Judge Ames was called upon to give. Both names are equally honored, but one must stand first and occasions and results have determined the precedence. By way of contrast we may recall the fact that the judges in 1854, in their opinion on the Dorr resolution had exactly the same opportunity that Judge Ames had in *Taylor vs. Place*. They stated the same unanswerable limitations of powers in the first part of their opinion that Judge Ames stated in his and then they made an illogical concession which practically nullified the whole. They had the occasion but missed the full measure of their opportunity.

In styling Judge Ames the great Chief-Justice of Rhode Island, the largeness of his ability is not to be measured by the littleness of the state. He would have been a great man anywhere. So many calls were made upon him outside of the state that he established an office in Boston, when he was in practice and both as a judge and law writer, he was widely known throughout the land. Enough has been said to show his leadership; the indebtedness of the state to him for the services he rendered; his character as a man; his rank as a jurist and the honor due to his memory.

Nobler and more truthful tributes were never paid to a man, than those which poured in from the bar and the press upon his death. They need not now be repeated or enlarged. The completest sum-

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mary of his character is that which is cut in stone upon his monument in Swan Point Cemetery on the Seekonk river.

“Upright, Learned, Fearless, Just, Sincere.”



SALMON PORTLAND CHASE.





SALMON PORTLAND CHASE

From a photograph by Bradley of Washington.







# SALMON PORTLAND CHASE.

1808-1873.

BY

EUGENE WAMBAUGH,

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**S**ALMON PORTLAND CHASE was born in Cornish, New Hampshire, on the thirteenth day of January, 1808,—just twelve days after the legal expiration of the slave trade. Cornish is now best known because the Connecticut River, neighboring mountains, and other elements of picturesque scenery make it a favorite resort of artists. In Chase's boyhood it was merely a neighborhood of farms. His own birthplace was the old homestead of the family, occupied by Chases almost ever since the time, some fifty years before, when Chase's grandfather, in the days of the French and Indian War, had led from Massachusetts a band of frontiersmen.

The Chases, as early settlers, had abundance of land, and were persons of influence; but, like their neighbors, they had no great wealth. Profiting by the nearness of Dartmouth College, they paid noticeable attention to education. Chase's elder brother was a graduate of Dartmouth, and so were

five of his father's seven brothers. Three of those five uncles must be mentioned here because of their connection with Chase's life. One of these three was Salmon, a lawyer of repute who lived at Portland, died just before Chase's birth, and was commemorated by Chase's name—Salmon Portland Chase. "I am my uncle's monument," Chase used to say, with kindly humor, fully realizing, one may be sure, that he seemed to most people to be something like an obelisk—tall, erect, impressive, cold. Another uncle was Philander, an energetic clergyman who with his youthful ardor as a convert to the Episcopal denomination had swept into that church, without much difficulty, it would seem, substantially all the Chases—formerly Congregationalists,—and who later carried his missionary zeal to the west, where he founded two denominational colleges and became successively the bishop of three dioceses. Another uncle was Dudley, often a member of the legislature of Vermont, four times speaker of the Vermont House of Representatives, for four years chief-justice of the Vermont Supreme Court, and twice Senator of the United States. Philander and Dudley were to be useful to Chase in ways that will be narrated later. All seven of the uncles quite unconsciously coöperated in making the homestead a favorable place for the early development of a future national statesman and chief-justice; for the diversity of their activities, even though the uncles might be far away, gave to the family at home some

insight into the occupations and tastes of various sorts of men. Among those seven uncles were representatives of each of the three specialties which were then deemed the only learned professions, and one farmer. Farming was also nominally the occupation of Ithamar Chase, Chase's father; but there is ample reason to believe that Ithamar's thoughts lay largely in other directions, for he was the neighborhood Justice of the Peace—a busy official of wide and patriarchal jurisdiction at that time and place,—and he was also a member of the Governor's Council. Chase wrote of him: "He was esteemed among his neighbors; was elected and for many years reelected to the Council of New Hampshire; a Justice of the Peace, with Honorable before his name, and Esquire after it, in which prefix and addition my mother took an innocent pleasure, mixed perhaps with a little pride. He was the honored and beloved friend of Mason and Webster."

Of the early days at the farm, Chase himself has written an account which shows how clearly certain incidents were remembered:

I remember the Frenchmen who came over, refugees from La Belle France and from the Bourbon restoration. They fled when the great Captain fell—Bonapartists all of them—ready for anything, willing to work—versatile—a few days with the Yankee farmer, chopping wood and teaching his little tow-headed boy *un, deux, trois, quatre, cinque*, and so on, till he could count a hundred in French, and thought himself a proficient in the tongue—then gone, none knew whither. . . . And I remember the school, and my sister, the school mistress



— a young girl fresh from Parson Uncle Philander Chase's female seminary at Hartford, but who seemed to me as awful as Minerva and Juno — not of my acquaintance then — as I walked respectfully on the other side of the road, creeping to school; and the soldiers, going to or coming from the war . . . and the birds I attempted to catch by putting salt on their tails . . . parties of boys and girls to the cold spring meadow, where we gathered fresh wild strawberries . . . the great eagle which soared high in air, over our farm houses, . . . a sleigh-ride with my father, up the Connecticut, and the joy of the sleigh-bells . . . my visit to the Cornish Flats, the town, and how important I felt at the tavern table for the first time in my life . . . my calf . . . the going a-fishing with my brother on the Connecticut . . . the sliding down hill on the snow over what seemed steepest descents and longest distances, headlong, on my wooden sled . . . ambitious to be at the head of my class, but without much other ambition; and not grudging that place to any one who fairly won it, and, least of all, to pretty Betty Marble.

Chase left those idyllic surroundings which he has so picturesquely described before he attained the age of eight. In 1815 the family removed to the village of Keene, some forty miles away. The reason for the removal seems to have been that Chase's mother inherited property in Keene. There Chase's father kept a tavern, and also engaged in the manufacture of glass; but he died in 1817, and Chase's mother was left with debts which swallowed up almost the whole of the family property. Yet though Chase's mother had very scanty resources for the support of the family—a large one,—she did not despair, and Chase once wrote: "She sacrificed and

stinted herself as a mother only can to secure to us the best education she could."

Chase happened never to pursue his education very long with any one instructor. From 1816 to 1820, his education included private instruction by his sister, a district school at Keene, a boarding school in Windsor, Vermont, another district school at Keene, and private instruction by a clergyman. Like many other boys of this period by the time he was twelve years old, he had begun Euclid, Virgil's *Bucolics*, and the Greek Testament.

When Chase arrived at the age of twelve, his uncle Philander, then the Protestant Episcopal Bishop of Ohio, offered to take charge of his education. Thus it happened that the boy had an experience which was extraordinary for a person of his age; for, partly with an elder brother, and partly with companions who were strangers, he traveled from New Hampshire to the central part of Ohio, using almost all the means of travel then available—stage, the first steamboat on the lakes—"Walk-in-the-Water,"—horseback, and walking. For part of the journey he had for a companion Schoolcraft, later known as a great traveler and an expert authority on the Indians, and doubtless this was the reason why the boy had the satisfaction of visiting a village of the Senecas and also Niagara Falls.

Chase's residence at his uncle's home, at Worthington, began in the spring of 1820. Chase worked on his uncle's farm and attended an academy which

his uncle controlled. Chase has written of the bishop:

My uncle, at the time I went to him, was in the maturity of his intellectual and physical powers. He was a great worker, a thoroughly practical man, always thinking of something to be done, and then doing it with all his might. . . . Usually exceedingly kind and a delightful companion to young and old, he was often very harsh and severe, not because he liked to be, but because he was determined to have everything just as he thought it ought to be. . . . Certainly, he lived to govern; but he liked to govern for the good of others, not his own. . . . He liked to overcome, too; great obstacles stimulated but did not discourage him. . . . Among us boys he was almost, and, sometimes, indeed, quite, tyrannical. . . . But he was not disliked — much less hated — he was revered and feared. He was not loved by them then — but, afterward, when they had left him, and looked back on the days they had spent under his charge, and saw him more as he really was, love mingled with their reverence, and became its equal in their hearts.

Chase was at Worthington for two years. The academy, which was taught by his cousin, made little impression upon his memory. To quote his own words:

I remember little of what happened there. I must have been required to compose; for I remember, on one occasion that my cousin commended a composition in terms which I thought quite unmerited. I must have been taught some Greek, also; for my exercise in an exhibition occasion — probably at the convention of 1821 — was an *original* Greek oration. How I puzzled over it; what trouble I had to turn my English thought into Greek forms! The grammar and the lexicon, and the Greek Testament were in great requisition. The subject was Paul and John compared — at any rate, Paul was a principal figure, though my

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memory may be at fault about John. The subject helped, for it allowed me to take sentences from the Testament, and so abridge my labor.

In the second year at Worthington, the school appears to have been discontinued, the cousin in charge having become a clergyman. Chase then had some private instruction from the bishop, being compelled to read Latin of a theological nature; and he read some history of his own accord. In Chase's own words: "Except this reading, and that of some books on church government, I was simply a farmer's boy, doing all kinds of farmer's boy's work." Chase has given specifications of a farmer's boy's work, thus:

Out of school I did chores; took grain to the mill and brought back meal or flour; milked the cows; drove them to and from pasture; took wool to the carding factory over on the Scioto, an important journey to me; built fires and brought in wood in the winter time; helped gather sugar water and make sugar when winter first turned to spring; helped plant and sow in the later spring. In most of whatever a boy could do on a farm I did a little.

There are reminiscences, too, of his rising before daylight and going eighteen miles on horseback before breakfast, in order to bring back supplies betimes from the neighboring city of Columbus, and of being ordered to kill and dress a pig, and being unfortunately tempted, when the pig's bristles by unskilful treatment would not come off, to shave that pig with "my cousin's razors, a nice new pair, just suited to a spruce young clergyman as he was."

There were occasional departures from merely agricultural pursuits. As Chase narrates:

In the vicinity of the town were some of those strange fortifications and burial mounds, which form so remarkable a feature of the Ohio and Mississippi valleys — mysterious monuments of an unknown race. I took great interest in these. I used to take Atwater's *Antiquities of Ohio* — I am not sure of the name of the book — when I went out into the forests after the cows, and could stop at an abandoned clearing, and sit down in the old log hut or in its shade, and read and wonder by the hour; and sometimes, perhaps, forget the cows.

Lest it be imagined that Chase was not a real boy, one must add from Chase's account of his days at Worthington a passage which has the additional interest of throwing light upon the importance, in those days at least, of understanding local prejudices.

I was the only boy from New England, and the other boys, whose ideas of a Yankee, derived from their parents and their friends, were, I fear, not altogether just, were much inclined, for a time, to twit me on being one. Every now and then they called me Yankee, in tones not altogether respectful. At length, I couldn't bear it any longer, and said to Tom James, when, one day, he called me a Yankee: "Tom, if you call me a Yankee again I'll kick you." "Well," said he, "You're a Yankee." As good as my word, I kicked him, and made the kick just as severe and just as disagreeable as I could. He was older than I, and I expected a fight. But, instead of attacking, he went after the bishop, and complained. . . . "Salmon," said the bishop very gravely and severely, "Tom James says you have been kicking him. Is it true?" "Yes, sir." "What did you kick him for?" "Because he called me a Yankee." "Well," said the bishop, "are you not a Yankee? Your father was, and I am, and we were never ashamed of the name." "Yes,

sir," said I, "I don't just mind being called a Yankee, but I won't be called a Yankee *so*," with a pretty decided emphasis on the last word. The bishop could not help smiling. I was not called a Yankee *so*, after that.

From certain letters written by Chase while Chief-Justice, enough has now been quoted to show that even when, late in life, he was full of cares, he could write picturesquely and humorously of his earliest years. Obviously, his rural experiences in two such widely separated neighborhoods were well fitted to be of assistance in broadening the mind of a future statesman, and especially of a future statesman who was in danger of thinking more of books and of abstract principles than of men. At the time, however, Chase did not fully appreciate his blessings. He was compelled to record in later life that his memories of Worthington, on the whole, were not pleasant. Doubtless the bishop was sometimes a trial; and the old home in New Hampshire seemed far away.

There now came a great change in Chase's life. Toward the end of 1822 he removed to Cincinnati with his uncle, who had become the president of Cincinnati College. Chase immediately entered the Freshman class, but soon qualified for advanced standing and became a Sophomore. The scholastic requirements, according to Chase's opinion expressed in mature years, were not exacting; but the students were full of mischief, and, although Chase appears to have taken no part in the pranks, the discomfort

of living under the bishop's eye was somewhat mitigated. The bishop, by the way, caused the boy to translate, outside the regular course, some forty or fifty pages of a Latin theological work, of which Chase remembered nothing except that it was a quarto and bound in parchment. The bishop's wish, as he had long made known, was that the boy should become a clergyman.

The bishop's missionary spirit brought to a quick conclusion the residence in Cincinnati. As the college was unsectarian, and the bishop longed for a theological seminary and a college of his own denomination, the bishop soon resigned the presidency, and went to England to secure money for his projected institution. Thus it happened that after living in Cincinnati for less than a year, Chase started back to New Hampshire. The journey eastward carried Chase through Steubenville, where he waded the Ohio in order to be able to say that he had been in Virginia. At Kingston-on-the-Hudson he parted from his uncle, and then by steamboat and on foot he returned to Keene.

Studies were resumed with the local clergyman. The family, however, still had scanty means, and thus Chase was tempted, early in 1824, to try to teach a country school in the adjoining township. The employment was of the slightest duration; for, as Chase has recorded: "There was one boy older than myself, and stouter, who took more liberties than the rest. . . . At last he did something which pro-

voked me greatly, and I gave him a pretty severe blow with the ferule on his head." Then the young teacher's resignation was requested, and he became the clergyman's pupil again. In the spring he went to Royalton, Vermont, where he pursued a special course in the academy. As a result of this special course he entered the Junior class at Dartmouth in 1824.

The chief events of Chase's life at Dartmouth—according to his own account—were that he taught school in the winter, produced, without serious consequences, doggerel verse ridiculing one of the college officers, and left college for a short time in order to emphasize his indignation at the unjust suspension of a classmate. Chase thought that he did not distinguish himself in his studies; but throughout life he criticized himself harshly. He graduated eighth in the class of 1826, which numbered thirty-six members at graduation.

A profession had not yet been selected. The plan was to teach school long enough to save a little money. After visiting several places which proved to be unpromising sites for a school, Chase went to Washington, which he reached near the end of 1826. An advertisement asking for pupils for a select classical school for boys resulted in attracting only one pupil. Chase himself must be allowed to tell what happened next:

Day after day went by and Columbus Bonfils remained the only name on my list. This would never do. I heard of clerk-



ships, and thought how nice it would be to have one, and, while performing its duties, to pursue the study of a profession. And why should I not have one? My uncle was a Senator, and a supporter of the administration. . . . I went to his lodgings, told him my story; how desperate the expectation of scholars seemed; my project of a clerkship, and — would he help me? His reply is not likely to be forgotten. “Salmon,” said he, “I once obtained an office for a nephew of mine and he was ruined by it. I then determined never to ask one for another. I will give you fifty cents to buy a spade with, but I will not help to get you a clerkship.” . . . I left him, greatly dissatisfied. . . . But now I am satisfied with his answer.

The plan for a school suddenly took an unexpected and fortunate form and rendered Chase's life in Washington ideally pleasant and profitable. He applied for a position to the owner of an established school for girls and boys; and this gentleman relinquished the boys' department, and gave Chase some classes in the girls' department also. Thus, early in 1827, Chase became the head of a small but well-established school for boys, and had among his pupils sons of Henry Clay and of William Wirt. There resulted a vast amount of mental exertion—for almost ten hours daily had to be spent in the classroom, and subjects covering almost the whole range of Chase's education had to be brushed up for daily use. There resulted also a considerable acquaintance with public men, and with Washington society, including an unusually advantageous acquaintance with the Wirt family.

Wirt was then Attorney-General of the United

States—an office which he held from 1817 to 1829—or through the presidencies of Monroe and of John Quincy Adams. He was much more than a nominal head of the American bar. He had enjoyed a long career of professional distinction in Virginia, he had written a well-known *Life of Patrick Henry*, and his professional and literary activities, as well as his long occupancy of the Attorney-Generalship, had made him a national figure of prominence. He was a man of many acquirements and graces, and of the highest character; and to him and to his very attractive family Chase was indebted—and throughout life anxious to express indebtedness—for a pleasant and valuable introduction to a life with a much wider horizon than could be found at that time among the farms and villages of New England and Ohio. For the daughters of the Wirt family he wrote, after the fashion of the time, verses, which are entitled to the modest praise of being classed with the poems of Blackstone and of Story. With the Wirts and their acquaintances he went to divers entertainments, private and public, including the levees at the White House. He was a great favorite with all the Wirts; and his association with this accomplished southern family added a touch of exceptional value,—that sympathetic insight into the south which he already had as to both the east and the west.

In the three years of Chase's residence in Washington, he seems to have taken greater interest in so-

ciety than in politics or law. His journals, begun during this residence and continuing, with breaks, for forty years, show that he imbibed to some extent Wirt's political views—especially his hostility to Jackson and Van Buren, though this was to be modified later.

Had he never met the celebrated Attorney-General he might never have studied law, for it was, doubtless, largely because of the influence of Wirt's shining example, that Chase decided to be a lawyer. Nominally, he studied law under Wirt. The extent of Wirt's teaching, however, was not great, for in Chase's "personal memoranda" one finds:

My reading for the bar had not been diligent or very extensive. I had looked through Burlamaqui at college. After I went to Washington, in 1826, and had opened my school in the spring of 1827, I received as pupils the sons of William Wirt, and was received by him as a student-at-law. It may well be believed that between the cares of a school and other duties, and the attractions of society and especially of the delightful family circle of Mr. Wirt—where I was ever welcomed with cordial kindness—I made no great progress in legal lore. Mr. Wirt never examined me. Only once did he put a question to me about my studies. He asked me one day while I was reading Blackstone if I understood him. I answered confidently, "Yes." But I was greatly mistaken, as I afterward found. The knowledge obtained by bare reading is of very little value. Books must be meditated and talked to be understood and converted into mental aliment. I forget what books I read besides Blackstone's Commentaries: Cruise's Digest, I think, and perhaps some others—Dalrymple on Feudal Law I remember as one, but the catalogue was very short.

Fortunately, it is possible to assist his memory with the following entry in his diary for 1829, in which he thus summarized the work of the early part of December:

I was now engaged in reading large quantities of law, daily. I read thirty pages in Espinasse's *Nisi Prius* and thirty pages in Stephen on Pleading, besides attending to numerous and urgent duties. Of course, I read superficially, but my object was rather to finish a certain number of books before I applied for admission to the bar than to acquire legal knowledge. I effected my object, but at a great sacrifice. I have given strength to a habit of superficial reading which was strong before. It will not now be easy to eradicate it, and substitute for it a habit of close attention and patient reflection. Yet this must be done, or my admission to the bar will do me little good.

It is hardly necessary to add the obvious comment that the student who had been sufficiently conscientious to make that entry in his diary had doubtless been sufficiently conscientious in his reading. At any rate, the only obstacle encountered by Chase when he presented himself for admission to the District of Columbia bar was a difficulty in convincing the judges of his compliance with the rule requiring the candidate's studies to have consumed three years. His diary has this entry for December 14th, 1829:

Attended the Court, and, with several others, was examined for admission to the bar. One was rejected, two were deferred; three, of whom I was one, were admitted. So I am now an attorney-at-law. I have a profession. Let me not dishonor it.

Returning to the "personal memoranda," one finds this more elaborate account:

Very seldom, I imagine, has any candidate for admission to the bar presented himself for examination with a slenderer stock of learning. I was examined in open court. The venerable and excellent Justice Cranch put the questions. I answered as well as I was able—how well or how ill I cannot say—but certainly, I think, not very well. Finally, the Judge asked me how long I had studied. I replied that, including the time employed in reading in college and the scraps devoted to legal reading before I regularly commenced the study, and the time since, I thought three years might be made up. The Judge smiled and said, “We think, Mr. Chase, that you must study another year and present yourself again for examination.” “Please your honors,” said I, deprecatingly, “I have made all my arrangements to go to the western country and practise law.” The kind Judge yielded to this appeal, and turning to the Clerk, said, “Swear in Mr. Chase.” Perhaps he would have been less facile if he had not known me personally and very well.

In view of Chase’s prominent connection with the slavery question in later years it is interesting to notice two indications that the question was presented to him in his days at Washington. In 1828, at the request of a member of the Society of Friends, he drafted a memorial to Congress, praying for the abolition of slavery in the District of Columbia. It is not clear that his connection with this memorial indicates an active interest in the question. On November 16th, 1829, he made this entry in his diary:

I read, to-day, the speech of Benjamin Watkins Leigh in the convention of Virginia. It is an able and ingenious defense of the ancient order of things. . . . A portion of the speech contained sentiments in which I heartily concur—particularly

in a vivid and striking delineation of the degrading arts practised by office-seekers. To other sentiments expressed in it I could by no means assent. The strange idea that the free laboring population of non-slave-holding states was on the same level, in the point of intelligence, and should be on the same level, in point of political privilege, was unworthy of Mr. Leigh and utterly abhorrent to every principle of equal rights.

After taking advice, Chase selected Cincinnati as the place to enter upon the practice of his profession. The choice was both natural and wise; for he was already acquainted in the city, and, though there were only about twenty-five thousand inhabitants, the population exceeded that of any other place in the west, had recently shown an increase of at least one hundred per cent in a decade, and was destined to grow with rapidity for years to come. The public landing at Cincinnati was the busiest spot in the west. Chase stepped off the steamboat at that landing in the spring of 1830. He has left a lively description of it,—an excellent specimen of the occasional vivacity and picturesqueness of his writing. Some weeks elapsed before he opened his office. Meanwhile he presented letters of introduction, argued at least one case in the moot court, and, as his diary shows us clearly, made rapid progress not only in enlarging his acquaintance in social but also in professional circles.

In June, 1830, he was admitted to the Ohio bar. He commenced practice on the first day of September. On the thirtieth, he made in his diary the following entry:

The month is ended. Its days have not gone without leaving a mark behind. My business has been very small, yet exceeding my expectations. I have earned about fifteen dollars, and perhaps shall be paid. . . . I have read, in law, about eight hundred pages in Starkie's Evidence. . . . I have, of course, read other books upon cases I have had. . . . I have been endeavoring to get a distinct and full knowledge of Aristotle's life, character, and writing. . . . In history, I have read Pitkin's United States. . . . In the newspapers, I have read the account of the new French Revolution. . . . In general literature I have done little—almost nothing. When I say I have read a few pages of Lucretius, in course, and a few pages in other authors without order, I have completed the account. In the Bible, I have read almost the whole book of Psalms, finding new beauties and new glories at every perusal. In composition I have done little with regularity. I have brought up my journal by writing about forty pages in this book, and have commenced several pieces, which are yet unfinished, besides bringing up long arrears of an extensive correspondence.

Almost from the beginning of his residence in Cincinnati, he showed public spirit and thoughtful activity. In October, 1830, he was the leading force in founding the Cincinnati Lyceum—an institution which would be described to-day as a university extension society. Chase delivered four lectures before this Lyceum. Two of the lectures were published in the *North American Review*—"The Life and Character of Henry Brougham," and "The Effects of Machinery." The article on Brougham contains Chase's first public utterance regarding slavery, in the form of a eulogistic comment upon Brougham's contest against the slave-trade.

Chase wrote for the newspapers also; but it would be a great mistake to imagine that he neglected either his business or the study of the law. His journal contains indications that he set himself the task of reading all the Ohio decisions—no great undertaking, as only three complete volumes of the Ohio Reports had appeared when he began practice. He set himself the much greater task of collecting and editing the whole mass of statutes, whether repealed or still in force, embodied in the many volumes, some of them very scarce, of the session laws of the Northwest Territory and of Ohio. As he himself has said:

There were, when this work was undertaken, already in existence, or hastening into being, seven volumes of territorial laws, and thirty-two volumes of the statutes of the state, together with twelve distinct volumes of local acts. Besides the more gradual alterations, which the law had undergone at the ordinary sessions of the legislature, there had been five professed revisions, at each of which great and important changes had been introduced. Of all these volumes, but four or five were furnished with any other indexes than bare tables of the titles of the acts. Under these circumstances, what wonder if the mind shrunk from the labor of research, and if an accurate knowledge of the statutes was a rare attainment, even among lawyers?

The three volumes entitled Chase's Statutes collected, in about twenty-three hundred pages, all the statutes, with side notes giving references as to amendment and repeal and indicating also the general purport of each section, and with footnotes containing the Ohio decisions and other comments. The



volumes appeared in 1833, 1834, and 1835 respectively; and by the time they were completed the author certainly had an unsurpassed acquaintance with the statutes and decisions of his state. Besides, his plan included a historical introduction, which gives the history of the Northwest Territory and of Ohio, from the lawyer's point of view.

Hand in hand with these various activities went careful attention to ordinary business. It is unusual to be able to give details as to professional careers of a time so remote. Yet voluminous diaries and letters, as well as the volumes of reports, show clearly enough that Chase had a business of more than respectable size and that his clients were eminently desirable.

In 1832, Chase became the partner, on equal terms, of Edward King and Timothy Walker, lawyers who are still remembered with great respect—the latter being one of the founders of the Cincinnati Law School and the author of the well-known *Commentaries on American Law*. This firm was dissolved in the same year, in order that Chase might form a more lucrative connection by founding the firm of Caswell & Chase, which was to have as its principal client the Cincinnati Branch of the United States Bank. Chase had a long-standing acquaintance with the managers of that institution, and to this fact, quite as much as to the fact that Caswell was already the bank's counsel, one may well attribute the founding of this firm. Later the Lafay-

ette Bank became a regular client of Chase's. He retained this association with banks long after the dissolution of this firm; and, in view of his subsequent career as Secretary of the Treasury, the connection must be considered as of unusual importance. Chase's practice ranged all the way from murder cases to patent law. Yet an inspection of the volumes of reports, although, of course, it cannot give an accurate conception of the amount of his business, indicates clearly enough that he was in demand chiefly for commercial law, land law, and chancery. It is remembered that he was not a fluent speaker, although his matter was clear and his manner impressive.

Chase's name is first mentioned in the Ohio Reports by a citation of Chase's Statutes in the 6th Volume of Ohio Reports.<sup>1</sup> He appears as counsel in the same volume, and rather steadily until the conclusion of Volume eighteen. Cases in which he was counsel are also found in Wright's Reports, the Western Law Journal, McLean's Reports, Peters', and Howard's. His career at the Ohio bar practically ended when he entered public life in 1849. Thereafter he practised almost exclusively in the federal courts, his most important argument being that in the great telegraph case of O'Reilly vs. Morse.<sup>2</sup>

Perhaps the clearest indication of Chase's early

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<sup>1</sup> Page 125.

<sup>2</sup> 15 Howard's Reports, 62.

success in ordinary business is afforded by his declining, in 1835, to be retained as the regular counsel of the wealthiest resident of Cincinnati,—against whom he then had a case in the Supreme Court of the United States—on the ground that it would interfere with his other business; but he kept the good will of that desirable client, and later represented him occasionally. It should be borne in mind that at the outset of Chase's career in Cincinnati there were fifty lawyers in that little city. It should be borne in mind also that, both then and later, throughout the state there were lawyers of eminence. For example, from 1841 to 1848, almost the close of Chase's career at the Ohio bar, the Ohio Reports contain the following names of counsel: Thomas Ewing, Henry Stanbery, Bellamy Storer, Timothy Walker, Allen G. Thurman, Robert C. Schenck, Charles Fox, Thomas L. Hamer, Edwin M. Stanton, Vachel Worthington, S. S. Cox, Benjamin F. Wade, Rufus P. Ranney, Gustavus Swan, Columbus Delano, Franklin T. Backus, Thomas Corwin, Peter Hitchcock, Joshua R. Giddings, P. B. Wilcox, Noah H. Swayne, Aaron F. Perry, Morrison R. Waite, Reuben Hitchcock, J. R. Swan, John Sherman, Rufus P. Spalding, Alphonso Taft, and William Dennison. It was among those lawyers, and others doubtless as skilful, though not so well remembered to-day, that Chase won eminence.

As all the world knows, Chase was apparently carried away from law and into the political move-

ment in behalf of anti-slavery. It would be an error, however, to imagine that Chase was ever primarily a philanthropist. It was through the ordinary course of legal practice that he entered into active thought upon the slavery question; and his attitude throughout the whole of that militant and brilliant period of his life was the attitude of the lawyer. It was in behalf of a client that he entered upon the problem. For that client he simply made the argument which he believed the law permitted and required. The law as it was, was what he wished to enforce; and by law he meant just what lawyers ordinarily mean, for whether one believed in his law or not, one always knew that he was not basing his argument upon that ethical conception which more ecstatic people termed "the higher law." In that strictly professional attitude lay Chase's strength as counsel. No mere enthusiast, however devoted, could have earned the title given to him—"Attorney-General for Fugitive Slaves." He gradually framed an ingenious and consistent line of thought to which even opponents, if they were lawyers, could listen with interest. His line of argument—though habitually unsuccessful—spread throughout the whole United States.

Possibly Chase's lyceum lecture in 1831 on Brougham was what drew attention to him as a person willing to serve as counsel upon the unpopular side of a fugitive slave case. At any rate, no other reason is at hand to explain why in 1837 James G.

Birney, the former slave-holder who had become an abolitionist, brought him his first case of that kind—litigation growing out of the refusal of a slave named Matilda to return to her master. The proceeding against Birney was in the state court under an indictment for harboring and secreting “a certain mulatto girl by the name of Matilda, the said Matilda then being a slave and the property of one Larkin Lawrence, contrary to the form of the statute” of Ohio. The argument in favor of Birney was that the statute of Ohio was unconstitutional. The Supreme Court of Ohio, in banc, decided in favor of Birney,<sup>3</sup> on the ground that guilty knowledge was essential and had not been shown. Although the court did not pass upon the constitutional question, it caused Chase’s argument to be inserted in the reports, as was then the practice with only important cases. Thus Chase’s reasoning was spread abroad and preserved. It has ceased, of course, to be of interest save to persons with a taste for history; and the same must be said of his other very famous argument, in *Jones vs. VanZandt*,<sup>4</sup> wherein he attempted in 1846 to convince the Supreme Court of the United States that the Fugitive Slave Law of 1793 was unconstitutional—an argument which, reprinted from the official report in pamphlet form, had wide circulation and influence.

It has frequently been asserted that Chase’s atti-

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<sup>3</sup> 8 Ohio Reports, 230.

<sup>4</sup> 5 Howard’s Reports, 215.

tude in the slave cases affected unfavorably his social standing and his business. He himself explained that this impression was inaccurate, or at least exaggerated. The truth is that his social standing had been rendered secure before he was engaged in this form of litigation, and that his attitude was so lawyer-like as to excite hostility from none but the most bigoted. Unquestionably he was upon the unpopular side, and unquestionably he did incur some danger of unpleasant loss of friends and of business, since the slave state of Kentucky was just across the Ohio River, and in Cincinnati, as everywhere, the slightest opposition to slavery created a suspicion that one sympathized with those extreme enthusiasts who, in their expressions of hostility to the United States, went to the very verge of treason. Yet Chase's attitude was moderate throughout. He made it clear enough that he was opposed to slavery; but his opposition kept within the lawyer-like bounds of insisting upon freedom of speech for all persons who wished to discuss the subject, a fair trial, and the restriction of state and national laws within constitutional bounds. Instances can be given of his failing to secure the business of very prejudiced clients by reason of his anti-slavery sympathies; but the truth is that the business brought to him increased constantly and that the only deleterious effect upon his future as a lawyer was caused by his intentional withdrawal from ordinary activities in order to devote himself to politics. Just as his association

with Wirt had led him into the law, and the law had brought him into contact with the slavery question, contact with the slavery question now led him into politics, in order that through altered legislation might be accomplished results impossible under the system then existing.

In this place it would be impossible and irrelevant to give a full account of Chase's political career. He found it impossible to belong permanently to any one party. The reason was repeatedly explained by him. To him a party organization or a party name meant nothing but a means of disseminating and enforcing certain views. If the end could be secured, he cared nothing for the name. He never realized that, to others, names usually were clearer and more important than ideas, and hence he never understood why he, the most steadfast of men, was accused of vacillation. His earliest and strongest political view was devotion to the union of the states and to the Constitution. He was hostile to all suggestions of disunion, whether coming from the south or from the north. Nullification as preached by Calhoun was no more repugnant to him than were the extreme views of such Abolitionists as called the Constitution "a covenant with death and an agreement with hell," and when those extremists went so far as to burn the Constitution, they simply increased the emphasis with which Chase insisted that he had never been an Abolitionist. His own attitude, from the time when he began to think about

slavery, was that slavery should not be allowed to go into new regions, and that, though it would be desirable for the individual slave states to destroy it, the national government could not abolish it in the slave states. Consequently he termed himself not an Abolitionist, but an Anti-slavery man. He was anxious, also, for it to be understood that before he became an Anti-slavery man his political views were merely nominal. Until after the presidential election of 1840, he usually voted the Whig ticket. His acquaintance with William Wirt and William Henry Harrison was enough to account for this. By 1840 his dealings with slave cases had caused him to consider slavery the chief question. In 1841 he became convinced that the Anti-slavery cause had nothing to hope from the Whigs; and he promptly severed his Whig connection. Devotion to the Union remained the strongest of his political principles; but now Anti-slavery came in as the second in time and in strength. In 1841 he signed a call for a State Liberty Convention, attended the meeting, and wrote the new party's address to the voters.

In 1842 he made an elaborate speech to the state convention of the Liberty party, and was chairman of the committee on resolutions and address. In 1843 he wrote the platform of the national convention, but did not approve a resolution, introduced in his absence, to the effect that any one swearing to support the Constitution might by mental reservation exclude obedience to fugitive slave laws. In



1844 he supported the Liberty candidate for the presidency—James G. Birney.

The Liberty party did not make such progress as he wished. He perceived the desirability of an Anti-slavery movement which, by being considered a league rather than a party, might get support from Whigs and Democrats. In 1847 he expressed a hope that thus the Democratic party might eventually be compelled to declare in favor of Anti-slavery, such a course being required, as he believed, by the traditional principles of that party. In the same year he attempted to induce the Liberty party to make no presidential nomination, but to await the possible formation of a new fusion of all Anti-slavery men. In 1848 the Ohio Democracy, by adopting an Anti-slavery platform confirmed his hopes of that party. In the same year Chase presided over the national convention of delegates, representing divers organizations, including the so-called Barnburner Democracy of New York. This convention formed the Free Soil party, otherwise called the Free Democracy, and also nominated Van Buren for the presidency.

In 1849 Chase was elected to the Senate of the United States, the regular Democratic members of the Ohio General Assembly combining with a few Free Soilers who held the balance of power. It should be borne in mind that Senator Sumner was elected in a similar manner. Chase became more deeply confirmed in his hope that the Democracy

would turn to Anti-slavery. He wrote a private letter giving this account of his political course:

I was educated in the Whig school, and as a lawyer rather than as a politician. In my latter capacity I was always tolerably independent; but I held in the main the views which are now generally denominated Whig (though, at the time, they were almost equally shared by both parties) up till 1840. In that year I supported Harrison, though an advocate myself of the sub-treasury system. I took, however, very little part in politics at that time. In 1841, having become satisfied that the Whig administration would be as pro-slavery as the Democratic had ever been, I united with a few others in the call for the Liberty Convention of December in that year. Convinced now that the question of slavery was the paramount one, and satisfied that the great principle of equal rights was correct, I began to test opinions by this standard. I was thus led to quite different views on the questions of bank, tariff, and government, from those I had taken up, in trust without examination, and became unreservedly a Democrat—with Democratic principles too strong to allow of any compromise with slavery. Holding these principles, I was content to go into the minority of the Liberty party and labor in it, when men counted me mad for so doing. These principles, however, led the Democrats to consent to my support last winter, and I now hold them as unreservedly, and as absolutely, without compromise, as ever. All I desire is to see the old Democracy follow out their principles to the same conclusions. Then we can all stand together.

When he entered the senate, he described himself simply as a Democrat; but in correspondence he frequently described himself as a Free Democrat or a True Democrat. It seems clear that his theoretical conversion to Democracy gave him the third of his political principles—third in time and third in

strength;—for afterwards he considered that, save as to slavery, he looked upon subjects precisely as Democrats looked upon them, and that he looked at slavery precisely as the members of that party, considering their general principles, ought to look upon that question. He wrote in 1851:

I wish that Democrats in all parts of the Union could return to the simple platform of the father of American Democracy, and be content to leave slavery and the extradition of slaves to the several states to be acted upon, under the obligations of the Constitution of the United States, according to their own discretion — thus severing the National Government from all connection with these matters, and leaving to it only the duty, so far as this subject is concerned, of maintaining all persons, where its jurisdiction is exclusive, in the enjoyment of personal freedom. This, however, is hardly to be hoped for at present. The next best thing would be cordial toleration in Congress, and out of Congress, of differences of opinion and action on slavery among Democrats.

The minute tracing of Chase's relations to political parties cannot be undertaken in this place, as has been said already; but the relation which he understood himself to sustain toward the Democratic party cannot be ignored in a sketch prepared for lawyers, for it illustrates how the lawyer's daily business may affect his political opinions. In the slavery cases, Chase had found it useful to insist that slavery is abnormal and repugnant to American ideals, quoting the Declaration of Independence: "All men are created equal; . . . with . . . certain inalienable rights; . . . among these are life, lib-

erty, and the pursuit of happiness." He had found it useful also to insist upon the words of the Ordinance of 1787 for the government of the Northwest Territory: "There shall be neither slavery nor involuntary servitude . . . otherwise than in punishment of crimes"—words embodied also in the Ohio Constitution of 1802 and rendered familiar to the whole United States by being ultimately embodied in the Thirteenth Amendment. He found it useful also to insist that slavery was a local institution, peculiar to certain states and not to be thrust upon others, and that, at least when slavery was concerned, the Constitution of the United States should be construed strictly. At every one of those points he encountered Jefferson—author of the Declaration of Independence, author of the draft Ordinance of 1784 from which the anti-slavery clause in the Ordinance of 1787 was taken, believer in states' rights, and teacher of strict construction;—and what wonder was it that Chase imagined that the party founded by Jefferson and professing to revere his teachings could be induced to embrace the cause of anti-slavery? After all, Chase was not very far wrong; for, though he was not able to secure for anti-slavery the party machinery of the Democracy, he was able to carry out of the party a vast number of men who thought as he thought; and he not only carried them out of the Democratic party, but carried them into a party to which was given, doubtless for argumentative purposes, the name by which Jefferson's party

had often been called—Republican. This is anticipating, however.

In his six years in the senate, Chase's record included efforts to establish the Court of Claims and to encourage a Pacific Railway; but he was most prominent as to slavery questions, opposing the Fugitive Slave Law of 1850, and the Kansas-Nebraska Bill of 1854. He was not alone, of course; but that his work, especially against the Kansas-Nebraska Bill, was of special effect was certified by Douglas, who afterwards said: "In opposition Seward's and Sumner's speeches were essays against slavery. Chase, of Ohio, was the leader." The reason why Chase was peculiarly annoying to his opponents was that he was clear, unimpassioned, moderate, argumentative, and lawyer-like.

In 1852 Chase participated with the Free Democracy and Free Soilers in the support of John P. Hale for the presidency. In 1855 he was elected Governor of Ohio by the Republican party, which was then forming through the coöperation of anti-slavery men from the old parties, a coöperation rendered easier through the disintegration of the Whigs; but this success could not have been gained without a temporary fusion with the Know-Nothings. In 1857 Chase was again elected by the Republicans. There is no occasion to detail his acts as governor. Suffice it to say that they maintained his standing as an active opponent of slavery. In 1856 and again in 1860 he was a prominent candidate for the Republican

nomination for the presidency. By promoting and consolidating action against the extension of slavery, Chase had fairly earned the nomination; but he was not the only person who had been of service, he had no personal magnetism, as the phrase goes, and he did not have the united support of the delegation from his own state.

In 1860 Chase was again elected to the senate; but on the first day of the session his name was sent in by President Lincoln for the secretaryship of the Treasury; and thus was begun a new career. As a leader of political thought and an organizer of political action, Chase had already gained a position second only to that of Jefferson; and now, by a strange coincidence, he was to encounter problems of finance with such success as to equal, if not excel, the official record of Jefferson's famous rival, Hamilton.

It would be impossible to exaggerate the importance of Chase's work as Secretary of the Treasury. The expense of the Civil War was so gigantic that no financial problem of equal magnitude had ever been encountered. The Secretary of the Treasury was free from interference by other members of the administration. President Lincoln professed entire ignorance of finance. It was upon the Secretary of the Treasury that responsibility rested for finding the money necessary for the preservation of the Union. The story of the plans that the Secretary devised might well take many pages; but for the present purpose it is enough to enumerate bonds, a national bank-

ing system, national bank notes, and legal tender paper. The Secretary's power with financiers lay in his personal integrity and his knowledge of banking. It must not be forgotten that Chase had been counsel for banks; and now it must be added that the national banking law was based largely upon the banking law of Ohio. Here again one sees how closely the divers parts of this many-sided life were tied together.

Yet though Chase was a success as Secretary of the Treasury, the position was full of care. Congress was not always tractable. The expense of the army was too great. Before Stanton became Secretary of War, Chase felt it necessary to pay some attention to the business of the War Department. He was not the only member of that Cabinet whose life was shortened by the labor and cares of the great emergency. Unfortunately, he did not thoroughly understand President Lincoln. Although there never was a quarrel, the two men were too different to harmonize. The difference was illustrated and emphasized by the diversity in their ideas of a jest. It would not be quite right to say that Chase had no sense of humor; but his humor was mild and literary in tone, and it never dealt with serious topics. Perhaps Chase stated the matter as well as it can be stated when he said: "The truth is that I have never been able to make a joke out of this war." From time to time he resigned; and at last, on June 30th, 1864, his resignation was accepted. The ostensible occasion for this last resignation had been a difference of opinion as to

an important appointment. In truth the real difficulty was discomfort because of difference in disposition. Yet President Lincoln had a high and unshaken opinion of Chase. He said: "Chase is about one and a half times bigger than any other man that I ever knew," and also "There is not one man in the Union who would make as good a chief-justice as Chase, and, if I have the opportunity, I will make him Chief-Justice of the United States."

The opportunity came soon. Chief-Justice Taney died on the twelfth of October, 1864. President Lincoln appointed Chase to the vacancy on the sixth of December. The result justified President Lincoln's opinion. Chase himself had often expressed his wish for service upon the bench; and, although worn beyond his years by the extraordinary cares of the Civil War, he entered upon the new office with an energy amply certified by the pages of Wallace's Reports. The term of his service as chief-justice was only a little beyond eight years, and in the last two years he was suffering from impaired health; but his judicial work was large in amount and important in kind. Besides sixty short opinions giving the court's decision, he composed ninety-four opinions of the court, three concurring opinions, and eight dissenting opinions, and, without writing a separate opinion, dissented twenty-four times and concurred in the court's conclusions—but not in the reasoning—three. Of the ninety-four substantial opinions of the court written by him, twenty-one dealt with constitutional



law, fifteen with international law, and ten with other questions growing out of the Civil War. His other important opinions dealt principally with federal procedure and commercial law. He did not arrogate to himself the exclusive writing of opinions in any one department; but in the departments specified he did so much judicial work as to be entitled to rank to-day as a specialist. The constitutional, international, and other questions arising out of the Civil War were largely novel. Chase was obviously well fitted to deal with them; for his many years of experience as a statesman had trained him to think of questions in a broad way, and his association with all parts of the country—East, South, and West—freed him, to a remarkable degree, from sectional prejudice. To enumerate all the important decisions in which he participated would be to write the judicial history of eight years of the Supreme Court of the United States and to give the impression, quite repugnant to him, that the chief-justice was the dictator of the court. Yet it is necessary to mention a few of his most important opinions.

The series of his opinions begins in the second volume of Wallace's Reports and closes in the seventeenth.<sup>5</sup>

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<sup>5</sup> The cases which should be examined by any one wishing to get at first-hand an impression of Chase's judicial services are: *Mrs. Alexander's Cotton*, 2 Wallace's Reports, 404; *Ex parte Milligan*, 4 Wallace's Reports, 2; *Cummings vs. Missouri*, 4 Wallace's Reports, 277; *Mississippi vs. Johnson*, 4 Wallace's Reports, 475; *The Peterhoff*, 5 Wallace's Reports, 28; *License Tax Cases*, 5 Wallace's Reports, 462;

The opinions written by Chase are usually characterized by brevity, clearness, and—as was requisite because of the questions involved—by an appeal to reason rather than to authority. In two celebrated instances the opinions of Chase, though adopted by the majority of the court, are peculiarly identified with the author. One of these cases is *Texas vs. White*, in which Chase reviewed the history of the Civil War from the lawyer's point of view, discussing the relation of states to the Union, and the constitutional position of a seceded state during the rebellion and afterwards, and introduced the famous passage: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." The other decision peculiarly identified with Chase is *Hepburn vs. Griswold*, wherein, writing the opinion of the majority—five against three—to the effect that the Legal Tender Act, passed by Congress during his secretaryship and at

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*Georgia vs. Stanton*, 6 Wallace's Reports, 50; *Lane County vs. Oregon*, 7 Wallace's Reports, 71; *Cowles vs. Mercer County*, 7 Wallace's Reports, 118; *Bronson vs. Rodes*, 7 Wallace's Reports 229; *Ex Parte McCordle*, 7 Wallace's Reports, 506; *Texas vs. White*, 7 Wallace's Reports, 700; *Thorington vs. Smith*, 8 Wallace's Reports, 1; *Ex Parte Yerger*, 8 Wallace's Reports, 85; *Veazle Bank vs. Fenno*, 8 Wallace's Reports, 533; *Hepburn vs. Griswold*, 8 Wallace's Reports, 603; *United States vs. Dewitt*, 9 Wallace's Reports, 41; *The Grapeshot*, 9 Wallace's Reports, 129; *United States vs. Padelford*, 9 Wallace's Reports, 531; *Thomson vs. Pacific Railroad*, 9 Wallace's Reports, 579; *Legal Tender Cases*, 12 Wallace's Reports, 457; *The Protector*, 12 Wallace's Reports, 700; *United States vs. Klein*, 13 Wallace's Reports, 128; *Osborn vs. Nicholson*, 13 Wallace's Reports, 654; *Huntington vs. Texas*, 16 Wallace's Reports, 402; and *Osborne vs. Mobile*, 16 Wallace's Reports, 479.

his instance, was unconstitutional, he frankly explained his change of view thus:

It is not surprising that amid the tumult of the late Civil War, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Some who were strongly averse to making government notes a legal tender felt themselves compelled to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced. These conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution.

When a change in the membership of the court caused the constitutionality of the Legal Tender Act to be upheld in the Legal Tender Cases, by five against four, Chase dissented; for he continued to hold the opinion that the legal tender quality attached to government notes was not authorized either by the necessities of war or by the more general doctrine that, in the absence of express prohibition, the national government may exercise any functions usual to governments.

The opinions of the Chief-Justice on Circuit are reported in the volume entitled *Chase's Decisions*. The circuit included states which had been in rebel-

lion. In such states the judges of the Supreme Court refused to sit until the courts had ceased to be subject to military authority. In June, 1867, at the first session of a Circuit Court held in the south by any Supreme Court judge, he explained this fully to the bar of North Carolina. The refusal of the Supreme Court judges to participate with the District judges in holding circuit courts had been taken as a protest against the continuance of military supremacy, and as an indication of a determination to assert that judicial functions are independent of the executive. The result was that the south looked upon the Supreme Court with greater favor than upon the other branches of the federal government, and welcomed the holding of court by the Chief-Justice as an indication that the war was over and that the country was returning to normal conditions. The nature of the opinions pronounced by the Chief-Justice on circuit still further increased the good will of the south toward the man who had been one of the most efficient instruments in destroying slavery and in suppressing the rebellion. In the circuit court and also in the Supreme Court the decisions, though in accordance with established doctrines of law, surprised and delighted the south by recognizing that, in matters not connected with attempts to overthrow the government of the United States, the governments of the several Confederate States and also the national government of the Confederacy must be deemed to have been governments *de facto*, and the acts of offic-

ials of such governments must be treated as not wholly void, and that marriages, conveyances, and other transactions not connected with the rebellion but depending for validity upon the participation of officials, should not be treated as non-existent.

It would be inaccurate to attribute to the Chief-Justice the whole of this effect upon the south; and it would be inaccurate to attribute to him exclusively the dignified and conservative attitude which was preserved by the Supreme Court as to all matters, and which restored the prestige sadly lost by that court through its dealings with political questions before the Civil War and through the preëminence of the executive and the legislative departments as long as the war lasted. *Inter arma silent leges.* The unsurpassed dignity of the Chief-Justice's personality and the obvious fairness and fearlessness of his mind were visible signs of the return of Law.

An unparalleled incident in the career of Chase was his presiding, as Chief-Justice, over the senate in 1868 at the impeachment trial of Andrew Johnson, President of the United States. Chase's views on reconstruction had not harmonized with those of the President. Nevertheless, many of the senators feared that the Chief-Justice would not favor the impeachment, and attempted to reduce his power to a minimum. The Chief-Justice quietly maintained the functions given to him by the Constitution as the judicial moderator of the senate, and made no attempt to influence the findings upon the several

charges; but his judicial fairness, and indeed his mere presence, did a great deal to preserve the dignity and moderation of the senate at that very trying time.

Throughout his career, Chase was the subject of many attacks. To-day only one criticism survives. From 1848, when he was desired by some persons as a candidate for the Vice-Presidency, he considered himself a possible nominee for the Presidency of the United States. The criticism still made is that he did not lay aside this ambition upon becoming Chief-Justice. In mitigation of that criticism, it can be truthfully alleged that he never sought the office by changing or concealing his opinions. Thus, in 1868, when he was considered a formidable candidate for the nomination at the hands of the Democracy, he announced his belief in the necessity of the ballot for the negro, saying that the pledge of the nation to maintain the freedom of the enfranchised race "requires, in my judgment, the assurance of the right of suffrage to those whom the Constitution has made freemen and citizens."

In writing of a man of such varied distinction, it has been necessary to omit much that would be quite enough to win something like immortality for others. For example, nothing has been said of Chase's connection with the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution; but any one who looks into the facts will find that the history of the War Amendments cannot be written without

mentioning him, and that, in one instance at least, the very words are partly his workmanship.

On the sixteenth of August, 1870, Chase had a stroke of paralysis. His judicial work was necessarily discontinued for a year, and it was then resumed, although he never fully regained his health. His last judicial opinion was delivered on the first day of May, 1873. He died on the seventh day of the month, having suffered a second stroke of paralysis upon the previous day.

Although Chase's life ended a generation ago, there are many men living who remember him and recall his personal appearance as the most impressive that they have ever seen, and as curiously appropriate for a person of his mental and moral characteristics. He was six feet and two inches in height, and admirably proportioned. His features, until marred by disease, were strikingly handsome, and indicative of both kindliness and reserve. He was of a serious and thoughtful disposition, conscientious and religious. Early domestic afflictions caused him to appear habitually sad; but even to the last he retained a stratum of playfulness. Occasionally he was too severe. He was greatly beloved by his friends, but he never secured general popularity. He was stronger before a judge than before a jury, and stronger in print than in speech. Although he always had definite opinions, it was always clear that he had given full attention to the merits of the other side. Whether he dealt with philanthropy, politics, finance, or any other subject,

however remote from law, the attitude of his mind was lawyer-like and judicial. He owed much, doubtless, to the broadening effect of residence in various parts of the United States. Surely no one has ever been more free from sectional prejudice. That he is a great figure in our history, that he played a chief part in the destruction of slavery, that he had much to do with the perpetuating of the Union, that he was the creator of the national banking system—all this is so well known that it is hardly necessary to repeat it. What seems peculiarly worth remembrance by lawyers is that every step of Chase's career grew naturally out of his profession, that his excellences were lawyer-like, and that he contributed much toward restoring to its proper influence the Supreme Court of the United States.





SEARGENT SMITH PRENTISS.



SEARGENT SMITH PRENTISS

From a daguerreotype in possession of A. L. Blanks, of Vicksburg,  
Mississippi.







# SEARGENT SMITH PRENTISS.

1808-1850.

BY

JOHN HANDY HALL,

*of the Pennsylvania and Virginia Bars.*

THE first few years of the nineteenth century witnessed one of those great migrations by which the waste places of the American continent were settled. The purchase of Louisiana, with the acquisition of the shores of the Gulf and the mouths of the Mississippi, brought a swarm of adventurers into the backwoods of the Carolinas, Georgia and western Florida, and resulted in the making of two new states in almost as few years. The new settlers were not so picturesque as the red-shirted gold-seekers who piloted their prairie schooners across the Rockies to California. They carried with them the insignia of a civilization which was based on political rather than social advancement. A large part, indeed, were true pioneers, the rough and rugged hunters and trappers of the forests; but mingled with these, and far louder and more assertive were the men in soiled linen and rusty black, chewing interminably on black tobacco, ready to reason confidently or quarrel quickly on any subject under the sun, and



equally ready to back up a losing argument with the derringer or the bowie-knife, ever at hand under the tails of their shabby frock-coats. There was a leaven of the younger sons of country gentry from the older states who would ultimately leaven the lump; but a great part of the new proletariat was ignorant, boastful, and ruffianly, negligent of many of the ordinary decencies of life, and with a pronounced distaste for the payment of any sort of debts, public or private. Charles Dickens saw and satirized the type in "Martin Chuzzlewit." But there were not wanting satirists in America to uncover the nakedness of their brethren, and the times gave rise to an ephemeral literature, of which Longstreet's "Georgia Scenes," and Baldwin's "Flush Times," and "Adventures of Simon Suggs, Jr.," are still sufficiently well-known examples.

The legal wants of this strange community were many, and were supplied in a measure by as strange a bar as was ever gathered together. Their few virtues and many shortcomings have been ably presented by Judge Baldwin in the "Flush Times." A few fair attorneys from the older states were the leaders. But few or none of these were men of any broad, general or legal attainments, and they were contented to seek their advantage for the most part in the quibbles and technicalities of the law, a tendency which was encouraged by the vast and colossal ignorance of the junior bar. These latter were, for the most part, men of no legal learning, nor ability of any sort;

and who had procured licenses to practice without any previous course of study or examination as to their knowledge of the law. They trusted for success to their assurance and their lungs, and obtained practice, says Baldwin, largely because their fees were chiefly nominal, their clients having little or no intention of ever paying up.

To this motley people and bar came an era of miraculous, if fictitious, prosperity. Cotton was, or seemed to be, king. The railroad had not yet superseded the barges, flatboats and broad-horns that swarmed over the surface of the great yellow rivers and carried the commerce of Ohio and the west past their shores. Slave labor was cheap and still plentiful; and there was an abundance of money, the dubious issue of the many small banks that had sprung from the ruins of the United States Bank. In the unsettled state of the new communities the results were inevitable and instant. Legitimate profit was despised. Business became speculation. Sport found its logical field at the faro bank or the poker table, where lightly acquired riches were as lightly dissipated. Matters political followed in the footsteps of matters social. The mushroom commonwealths engaged in financial ventures which would have staggered imperial revenues, and speculated as cheerfully as their boldest citizens. Adventurers, gamblers, and worse flocked from all quarters of the earth. Great fortunes were made on paper. To every sober observer it must have been obvious, long

before the inevitable end, that the chapter would close with private insolvency and public dishonor.

It so happened that if any person living in Mississippi between 1835 and 1850, whether a wild backwoodsman of the Chickasaw, a Natchez gambler, or a solid citizen of the cotton counties, had been asked who was the greatest man south of the Virginia line, he would have unhesitatingly answered: "S. S. Prentiss;" and it is ten to one that he would have made the same reply if asked who was the greatest man on earth. In the words of a Mississippian of those early days: "Prentiss cast a spell over the whole region of the Gulf and the lower Mississippi." To the half-savage woodsman, the turbulent flatboatman, the town bravo and gambler, as well as to the opulent planter, the thriving merchant and the professional man of every type and stripe, this little, halting lawyer from farthest New England represented the *summum bonum* of intellect, the acme of attainment, and personified to a great extent the spirit of his time.

Seargent Smith Prentiss was born on September 30th, 1808, in the town of Portland, Maine. He was of New England stock, the first of his name (then spelled Prentice) having come to America with the apostle John Eliot, in 1631. His father was the captain of a merchantman, and supported his family on a New England farm near the small village of Gorham, now a suburb of Portland. An illness in early infancy determined the whole course of the son's life.

He came out of it alive, but with a stunted growth, and a misshapen leg which made him a cripple for life. He began to attend school in a go-cart drawn by his brother; later, he hobbled on crutches; these he in turn abandoned for the cane, which afterwards he always carried.

While Prentiss was ever a voracious reader and a close student, he might in the ordinary course of things have lived and died a farmer or sailor; but his lameness determined his future career. As he was unfitted for physical labor, and the circumstances of the family did not admit of drones in the domestic hive, it was decided that Seargent should have a liberal education and a profession. He was accordingly sent at sixteen to Bowdoin College, where he completed the two years' course with credit, and took the degree of Bachelor of Arts. He does not seem to have taken any collegiate honors; but his teachers and schoolmates remarked the versatility and ease with which he mastered widely differing branches of knowledge.

While at college Prentiss had lost his father. So, immediately upon his graduation, he was entered as a student in a law-office, and after ten months' study set forth to seek his fortunes, slenderly provided with a few dollars in money and a letter of introduction to a Cincinnati judge. The letter was delivered, but Prentiss did not believe that Cincinnati offered a suitable field of opportunity. As he himself expressed it: "This place is too cheap to thrive in. I

can never make a living where apples are two bits a peck." He therefore, after three months in the judge's office, determined to go farther, into the newly organized state of Mississippi. The Cincinnati jurist generously advanced him money for his expenses, and besides secured him valuable letters of introduction to citizens of Natchez. The journey was made by steamboat, and Prentiss duly arrived in Natchez, a town situated where La Salle in former years had found a flourishing and semi-civilized Indian capital, and at this time one of the busiest towns on the Mississippi.

The first act of the new arrival was characteristic. He had but five dollars remaining in the world. With this, he went to the best hotel, secured a room, and going to the bar invested his entire capital in a bottle of wine and a box of cigars, which last he handed out freely to the waiters. In after years when twitted by a friend with this act of improvidence, he said:

You don't understand human nature; that five dollars established my credit, and I never had any trouble with my landlord afterwards; besides this, I thought to myself, "Well, now the last of my little pile is gone, and I feel for the first time that I am thrown upon my own resources. I can make my own way in the world, and I will.

Prentiss had come to Mississippi to teach school and to study law, and he proceeded to do both. His letters secured him a position as tutor for the five children of a country gentleman, receiving in return

his board and three hundred dollars. In the log school-house on this estate he spent two years, to the great profit of his students and himself, prosecuting arduously his legal studies, and exercising his talents as a speaker in the neighborhood debating society which met weekly at the Union Chapel. He developed an equally prominent but less valuable trait by playing poker and "brag" with other young fellows of his kidney and with the gamblers of Natchez. What was his better judgment on this subject, is shown by the following anecdote: Returning on one occasion from the card-table, a winner to an extent larger than ordinary, he purchased with his winnings a watch and a fob, which he presented to his favorite pupil on receiving the latter's promise never to gamble in any form.

On quitting his school, on January 1st, 1829, Prentiss was entered as a student in the law-office of Robert J. Walker, of the Natchez bar, afterwards senator from Mississippi and Secretary of the Treasury for the United States. He had but six months in which to complete his legal course before applying for his license to practice, and three of these he idled away in a trip to New Orleans on a broad-horn. The rest he employed to such good purpose, that he stood a creditable examination, and was duly licensed to practice in the Commonwealth of Mississippi. He was not yet twenty-one years of age, and his prospects did not appear especially encouraging. But he was always a man of many friends. General Felix

Huston, a lawyer of considerable practice, was attracted by the young attorney, and took him into partnership. His share was small at first, but his abilities needed only the opportunity for their display, and in a year's time, Huston was glad to sign a new contract allowing him a third of the profits.

Prentiss' first case was as assistant prosecutor in an indictment for burglary. Convictions were few at that day in Mississippi, but Prentiss so forcibly and powerfully presented his case that the defendant was convicted and sentenced, expressing his conviction that "If an angel of light were tried and that man were the prosecutor, he would convict him." Shortly afterward Prentiss appeared as prosecutor in a very celebrated trial; that of Phelps, the black sheep of a respectable family in the North, who had strayed into the river belt, where he subsisted by robbery and murder. His lawless deeds had not deprived him of a certain local popularity, such as attaches to a free-handed bandit; and his conviction was not so easy a matter as it might seem at first glance. For the defense appeared General Foote, one of the ablest lawyers in Mississippi. Phelps was convicted and sentenced to be hanged. So profound an impression had the prosecutor made on one at least of his audience, that the convicted man sent for Prentiss, and unbosomed himself to him as to his family name and his private affairs. In the course of the conversation he stated that, while on trial, observing the rapt attention of the court-room, he had planned to escape by

springing upon his prosecutor, striking him down, and escaping in the confusion. To this Prentiss coolly replied: "I saw it all, and was ready for you." Phelps was not hanged. He resisted arrest, broke jail, and was killed defying capture. Prentiss was again employed as prosecutor in the case of Byrd vs. State. It was the trial of a free negro for the murder of a rich river planter. One of the planter's slaves had already been convicted of the crime; and Byrd's indictment was based on after-discovered evidence of a purely circumstantial character. The prisoner had the services of able counsel, General Foote leading for the defense; and a first conviction was reversed on technical grounds. Convicted again, a writ of error was taken on the ground, *inter alia*, that the public prosecutor had been permitted, in spite of objection, to withdraw, and leave the conduct of the prosecution to Prentiss. The judgment was affirmed, notwithstanding this unique exception, and Byrd was hanged, after having made a full confession. Prentiss was already disgusted with this class of work, and declared to a friend that he would never prosecute another man for a capital offense; a declaration to which he adhered.

These last two cases were tried at Vicksburg, a growing town to which Prentiss had removed in February, 1832. His first case in that town is also worthy of note as showing his influence over men, even in an unpopular cause. The yellow fever had broken out in a large hotel, and the town council



passed an ordinance to place the building under quarantine. Prentiss applied for an injunction, and argued to such effect that even popular panic was overborne, and the quarantine ordinance was declared invalid.

In 1833 Prentiss was admitted to practice before the United States Supreme Court, and appeared before that body in the case of *Sampeyreac vs. United States*. In this case, he represented the appellant, an innocent purchaser of land for which a fraudulent patent had been taken out in the name of a fictitious patentee. The opposing counsel were Fulton and Taney. Prentiss manifested none of the awe or timidity which might be expected to embarrass a young lawyer at the bar of this high court. His argument was in his best style, combining acute knowledge and mastery of the law and facts with the most pictorial eloquence. He was heard with close attention by the court, and warmly praised by the venerable Chief-Justice Marshall. But his client's cause was too bad for salvation, from a legal point of view, and the encomium was coupled with an affirmance of the adverse decree.

Shortly after this time, Prentiss entered another field. The nation was divided into three political camps. The Jacksonian Democrats advocated government of and by the common people, subordinating all other authority to that of the *demos*; the States' Rights Democrats, under the leadership of Calhoun, upheld a government by the States as sovereign units,

and, more radically, the "reserved rights" of the States; the Whigs stood for national solidarity and centralization, also, more particularly, for a national bank, a protective tariff, and a system of mutual compromise on the question of slavery in the territories. It was under this last banner that Prentiss enrolled himself, and to this he remained through life a devoted partisan. "What a glorious Whig transparency my heart would make," he once said. His first appearance in the political field was in a political joint debate, wherein he had for antagonist his old rival General Foote. This adversary he overthrew with some ease. It is characteristic of Prentiss that he realized the powerful popularity of General Jackson, then president, and made no direct attack upon that idol of the commonalty. Instead he fell upon Van Buren, whom he derided as

"Albany, with feeble hand, receiving  
The borrowed truncheon of command."

While in Washington busied with the Sampey-reac case, Prentiss made the acquaintance of Henry Clay. The men were very similar in attainments and in likes. Both were orators of parts, both *bon vivants*, and both inveterate and daring gamblers. The elder was then at the height of his fame. For Clay, Prentiss formed an attachment little short of idolatry, which lasted throughout life.

Meanwhile Prentiss was not neglecting his business at Vicksburg. He had formed a partnership with a steady office-lawyer of substantial practice,

and boasted that he was making three thousand dollars a year. He also engaged at this time in the land speculation which made and afterwards unmade his fortune. The founder of Vicksburg was a Methodist parson named Vick, who began to lay out the new city upon his lands along the river front, and died, leaving a will by which he gave to his wife one equal share of the personal estate, with a certain tract of land for life, "reserving two hundred acres, however, on the upper part of the uppermost tract to be laid off in town lots," at the discretion of his executors. By subsequent clauses, he gave

To each of my daughters one equal proportion with my sons and wife of all my personal estate as they come of age or marry, and to my sons one equal part of my personal estate, as they come of age, together with all my lands. All of which lands I wish to be appraised, valued and divided when my [youngest] son Wesley arrives at twenty-one years. . . . I wish my executors furthermore to remember that the town lots now laid off, or hereafter to be laid off on the aforementioned two hundred acres of land, should be sold to pay my just debts or other engagements in preference to any other of my property, for the use and benefit of all my heirs.

It was on this cryptic testament that the city of Vicksburg and the fortunes of many of her citizens rose and fell. It was no sooner admitted to probate than it became the fruitful parent of litigation. After many proceedings and several appeals, the administrator c. t. a. applied for an order to sell one hundred town lots to pay debts. The daughters of Vick asked a partition which was ordered; and commis-

sioners were appointed, whose plat showed a tract laid off for commons. The administrator proceeded to sell certain lots, and close out his account. To further complicate matters, one, Rappleye, a vendee of certain of the minor heirs of Vick's sons, brought an ejectment to recover part of the "Commons." Matters being in this lucid state, a new actor appeared on the boards. The city of Vicksburg came into the Chancery Court, at that time a separate tribunal, and asked an injunction to restrain Rappleye's suit, alleging that the commons had been dedicated to the city, firstly, by Vick's will, and secondly, by the acts and proceedings of the administrator c. t. a. and the daughters, as above set forth. Prentiss had bought the larger part of the interest of the heirs, and appeared as their counsel. The case was twice tried before the "High Court of Errors and Appeals," the court of last resort, and was at last decided against the city, on the ground *inter alia*, that the daughters of Vick, under his will, took no share in his real estate. The case has been reproduced somewhat fully, no less because of its influence on the fortunes of Prentiss, than as an interesting example of the involved state of land titles in Mississippi in his day.

Pending the determination of this suit, the long-standing rivalry between Foote and Prentiss reached its culmination after the fashion common to the place and period. Foote was noted for his bitter tongue; and, during the trial of a cause, Prentiss

resented some particularly objectionable remark by striking Foote in the face. A challenge followed in due course, and the parties met across the river in Louisiana. Prentiss was a noted shot; but his New England training so far asserted itself that he bitterly deplored the duel, and privately declared that he would not hurt Foote. The latter, however, fired so quickly as to draw Prentiss' fire before it was intended. A hole in Foote's coat was the only injury sustained; and the parties left the field. The matter would have been at an end but for certain busybodies. These carried word to Prentiss that Foote had declared, that, in using his cane as a support, Prentiss had virtually fired from a rest. In a rage, Prentiss sent a defiance to Foote, who renewed his challenge. The changed nature of the duel was recognized by the whole country-side. At a public cock-fight near Vicksburg, the birds were named after the parties to the coming duel; and on the day set, a large crowd had assembled on the ground. At the first fire Prentiss' pistol snapped; at the second, Foote was seriously wounded. Before firing Prentiss had ostentatiously thrown away his cane. In reply to reproaches from his New England home he wrote:

I could not have acted differently. If I had, I should have lost my own self-respect, and life itself could have had no future object for me. I am no advocate of duelling, and shall always from principle avoid such a thing as much as possible, but when a man is placed in a situation where if he does not *fight*, life will be rendered valueless to him both in his own eyes and those

of the community, and existence will be rendered a burden to him, then I say he will fight, and by so doing will select the least of two evils.

The final decision in *Rappleye vs. Vicksburg* left Prentiss, to all appearances, a man of wealth. The first use of his newly acquired means was creditable. He at once placed his distant family beyond the reach of want, and proceeded on the first of those visits to his birthplace which afterward recurred at frequent intervals. Prentiss was never at heart a Mississippian. He had so identified himself with the spirit of the times of his adopted State that he was her archetype and her popular idol; and in his far Maine home he could never have been other than an alien and a cause of scandal. But through life, his heart turned from the muddy rivers, the levees and cotton-fields of Mississippi, to the shores of Casco Bay, the rugged farms and forests of Maine. His moments of relaxation were spent at Gorham, and no applause was so sweet to him as that of his small home village. In Gorham, at this time, he lingered for a few weeks. Returning to Vicksburg, he found changes. The town was in the hands of vigilantes, who had hanged or banished the whole tribe of lawless gamblers that infested its river front. From this scene of disorder, Prentiss was called by the news that his former partner, General Huston, had been stricken with small-pox near Natchez. He at once went to Natchez, and nursed his sick friend through the loathsome disease, contracting it himself,

but in a milder form, which, fortunately, did not disfigure him.

Prentiss was, soon after his return, elected to the state legislature, where he at once took place among the leaders of the minority in the lower house. He spoke with ability and success on such diverse questions as the creation of a new judicial district and the erection of a Union Chapel at Jackson. He bitterly opposed the State Banks, declaring that: "You'll go on from bad to worse until, to cap the fraudulent climax, you'll charter every man's breeches' pocket into a banking institution." But on that great blunder, or worse, the chartering of the Union Bank, with a capital of fifteen millions, which worked the subsequent ruin of the State, he was silent, and seemingly acquiescent.

The first true test of Prentiss' powers came in the Chickasaw Counties debate. Eleven counties had been organized out of the land purchased from the Chickasaw Indians. The bill by which the counties were organized was vaguely worded as to their representation, and the succeeding session of the legislature found ten "Chickasaw Chickens" knocking for admission at its doors. No apportionment of the inhabitants had been made nor Writs of Election issued for the new counties, as required by the State Constitution, and the motion for their admission was bitterly opposed by the Whigs. Prentiss led the fight in a great speech, concluding with the declaration that the adoption of the proposed motion

Will part the laws from the constitution, and set them adrift like the broken spars and rigging of a dismasted vessel, which beat against and destroy the very keel they were intended to support.

But party spirit was too strong for eloquence and logic. A curious scene ensued. A motion to lay Prentiss' minority report on the table was put, and the new members offered to vote upon it. Prentiss objected when the first name was called. It was that of the Honorable Mr. Bugg of Chickasaw. The chair decided that Bugg was entitled to vote. Prentiss appealed. Yeas and nays were called for. Again the name of Bugg was reached. Again Prentiss objected to Bugg's right to vote on the appeal. This objection was overruled, an appeal was taken, yeas and nays were called for, again the name of Bugg was reached, and again objection was taken, overruled, and appeal taken from the decision that Bugg was entitled to vote on the appeal from his right to vote on the appeal from his right to vote on the original motion. The original mover tried to break the endless chain by withdrawing his motion. But the vote on leave to withdraw was once more barred by the calling of the name of Bugg, and the consequent objection and appeal. At this point the harassed speaker cut the Gordian knot by refusing to put the appeal until the main question was put, and then adjourned the house amid loud outcries against such tyranny. On the following day the whole question was taken up *de novo*, and again



matters came to a stand-still at the ominous name of Bugg. The speaker, however, kept to his previous ruling, and was sustained by a good majority of a wearied house. The new members were then voted in one at a time, each receiving the votes of the other nine; the irreconcilable Prentiss meanwhile declaring: "You Chickasaw men are hoisting yourselves into our house by the waistbands of your own breeches."

At the close of this session Prentiss abandoned, in considerable disgust, his thankless position as the Whig Cassandra of a Democratic House, and returned to his law practice. He celebrated his retirement by another visit to Gorham, where he delivered a Fourth of July oration. His political career would have been closed at this time, but for a suddenly offered opportunity which transferred him at one bound from the local to the national arena.

In May, 1837, Van Buren called an extra session of Congress to consider the financial condition of the nation. It so happened that the Mississippi representatives had been elected for the term from November, 1835 to November 1837. But as the Twenty-fourth Congress to which they were elected had expired in March 1837, they were *functus officio*. The constitution of Mississippi provided for a regular election every two years, the time, place, and manner of holding the election to be prescribed by the legislature. There was also a provision that the Governor might issue writs of election to fill va-

cancies. Fearing that the state might go unrepresented, the Governor issued writs to fill vacancies. Prentiss was one of the Whig nominees, but the former members were returned by substantial majorities. A contest was promptly instituted. The newly returned members made the mistake of claiming that they were elected for the full session, instead of until the November following. After a sharp debate, they were confirmed in their seats for the Twenty-fifth Congress.

The Whigs promptly saw their tactical advantage, and Prentiss was called home to stump the state. His fiery eloquence and indefatigable labors turned into a rout the advantage which the false step of the Democratic members had afforded his party in the state. As a result, he was returned by a large majority, and carried with him his colleague, an unknown young lawyer of Pontotoc.

At the opening of the regular session of the Twenty-fifth Congress, Prentiss appeared with his colleague, and claimed their seats as representatives. A hot debate followed. The picturesque Wise of Virginia and Gohlson, one of the seated members from Mississippi, engaged in a personal altercation, as a consequence of which Prentiss was called upon by Wise to carry a challenge. Prentiss received it only on the condition that the matter be left entirely in his hands. The following day he returned it, holding Wise to his promise, and emphatically refusing to allow the matter to go farther, on the

ground that no challenge was called for by the facts. For this friendly interference Wise afterwards expressed sincere gratitude.

After this warlike prologue, debate was formally opened. Claiborne, the senior seated member, in a strong and conservative argument, set forth his side of the case, representing that it was well known that the first election was for the entire Congress, and that the change in the popular vote was caused by the refusal of his partisans to take part in the election, a statement which would seem in some measure borne out by the reduced aggregate vote. Prentiss rose to reply. The greatness of the occasion, the majesty of the tribunal, had no intimidating effect upon him. He opened with dignity, secured the early and close attention of all, and proceeded, during the sessions of three days, to pronounce one of the most masterly pieces of advocacy ever heard on the floor of Congress. Using every possible argument, with close, grinding logic, throwing off a continual stream of sparkling eloquence, he sought to shape and temper to his will an obstinate and adverse audience. His peroration was notable:

You sit here twenty-five sovereign States in judgment on the most sacred rights of a sister State,—that which is to a State what chastity is to a woman, or honor to a man. Should you decide against her, you tear from her brow the richest jewel which sparkles there, and forever bow her head in shame and dishonor. But if your determination is taken, if the blow must fall, if the Constitution must bleed, I have but one request on her behalf to make: When you decide that she cannot choose

her own representation, at the same moment blot from the star-spangled banner of this Union the bright star that glitters to the name of Mississippi, but leave the stripe behind,—a fit emblem of her degradation.

The effect of Prentiss' speech was overpowering. Webster, from his seat, called out: "That can't be beat." The reporters excused the inadequacy of their notes by declaring that they could not exactly transcribe the words of a man who spoke as if inspired. The opposition speakers who arose in rebuttal, began their arguments diffidently with complimentary allusions, and suggested questions rather than made arguments. Could an immediate vote have been taken, Prentiss must have been seated. As it was, a motion was passed denying the right of the seated members to their seats, thus reversing the action of the previous Congress. But when it came to seating the contestants, a partisan house wavered. A long debate diminished the effect of Prentiss' effort. At last a vote was taken on the question whether the contestants were elected. A tie resulted. James K. Polk, the Speaker, voted to break the tie, and earned Prentiss' undying enmity by settling the question in the negative. Both sets of claimants were thus ruled out, and Mississippi was unrepresented. Prentiss at once took the floor and defiantly announced that he would return after the ensuing elections with undisputed credentials as Congressman from Mississippi.

The night of his departure there was a great Whig

love-feast. Such a defeat was a triumph. White, the father of the House, presided. Clay and Webster were present. Wine and oratory flowed freely. At last the cries of "Webster" brought forth that great leader for a second time. In what seemed to the excited minds of those present one of his greatest efforts, he pleaded for the nationalization of the States, concluding with the exordium: "And you, my southern brethren, shall my children be aliens to your children, and shall your children be aliens to my children?" Applause broke forth, hands were clasped, and tears were shed. In the midst of the excitement, an over-enthused member from Kentucky arose, crying out "Reform! Revolution! Liberty or death!" and hurled an empty champagne bottle at Webster's head, which it fortunately missed. This untoward event very naturally broke up a meeting typical of the greatness, the passions and the vices of the day.

Returning to Mississippi, Prentiss made good his word. Never had such a campaign been seen, and in the State wherein it occurred it will never be forgotten. The Democrats had cast off the apathy of the preceding fall, and worked as they had never worked before. But Prentiss was invincible. He invaded the remotest corners of the State, not even neglecting the Chickasaw counties, where his name was naturally unpopular. He spoke from stumps, levees, cotton-gins and cross-road stores, and, on one occasion, from the top of a wild beast's cage, when

he was forced to divide time with the enterprising owner of the menagerie, who had found in the crowds that flocked to hear the orator, his heaven-sent opportunity to turn a penny. It was the day of great political gatherings. Newspapers were far and few, and sports had not been organized into public amusements. The people took their pleasure, and found their information, in huge political gatherings and joint debates, where they were fed upon burgoon soup, wherein floated squirrels and chickens roasted whole, and upon the barbecued carcasses of shoats and oxen, while the greatest speakers of the time strove to convince their minds and win their votes for this or that party or candidate. And no campaign like this had ever been seen before in Mississippi.

In all his speeches, Prentiss was wise. He stole the enemies' thunder by repeatedly asseverating the wrong that had been done the cherished principle of States' Rights by the refusal of Congress to recognize the regularly elected representatives of Mississippi, and by the exclusion of that State from the legislative councils of the Nation. The wisdom of this course was shown by the result. The Whig candidates were returned, but by less than two thousand majority. Prentiss told a friend that he was "gratified but not satisfied" with the result. He now returned to Congress and took his seat, protesting that he held it by virtue of his first election. During the short remainder of the session, he made a great speech against

the sub-treasury bill, of which the fame, but no record, remains.

On leaving Washington, Prentiss was invited to deliver an address at Havre De Grace, Maryland. The opening sentence is characteristic of the one great idea of his political life:

Fellow-citizens: — By the "Father of Waters" at New Orleans, I have said "Fellow-citizens." On the banks of the beautiful Ohio I have said "Fellow-citizens." And a thousand miles beyond this north, thanks be to God, I can still say "Fellow-citizens."

This speech was made on his way back to Gorham. But he was not allowed to remain at rest in his early home. The Whigs assembled in Boston to hold their anniversary in Faneuil Hall, and he was summoned, much against his wish, to attend. It was a great occasion. Everett opened. Webster, Sprague, Lawrence and others followed. Late in the evening, when all were weary, the toast to Mississippi was drunk and Prentiss rose. It was almost the greatest of his recorded speeches, and marked the apogee of his talents. After a magnificent apostrophe to mechanical labor, which would, he declared, grapple the States together with hooks of steel, regardless of warring leaders or sections, he once more laid down his great principle of union.

Let us hang together for fifty years longer, and we may defy the world to separate us! . . . When I cannot come from Mississippi and call the men of Boston my fellow-citizens, my kindred, my brethren, I desire no longer to be myself a citizen

of the Republic. Yes, we are all embarked in one bottom, and whether we sink or swim, we will swim or we will sink together.

The sleepy assembly had long ago waked to close attention and rapturous applause. At the close Edward Everett turning to Webster said breathlessly: "Did you ever hear anything like it?" To which Webster replied: "Never, except from Prentiss himself."

On his return to Vicksburg, Prentiss found that his fame had preceded him, but that certain politicians proclaimed that he was at heart a northerner and an abolitionist, as witness his spoken sentiments. To counteract this he delivered the third speech of his great union trilogy at Vicksburg, where he published to the south what he had declared in Maryland and New England, and with equal eloquence. But the iron of calumny had entered his soul, and he closed by announcing that he would serve out his term, but would not stand for reëlection.

Through the remainder of his congressional term, Prentiss indulged in frequent and fierce attacks upon the corruption then prevalent in public office. At its close he vigorously disputed the motion to give the usual vote of thanks to the speaker, urging that, at any rate, the word "impartial" should be expunged from any such resolution. Polk's casting vote in the Mississippi contest was not forgotten. At a later day Prentiss said of Jackson and of Polk, who was then a candidate for presidency: "The old war-horse dashed through the crowd of common men,



and when he emerged, James K. Polk was found, like a cockle-burr, sticking to his mane."

Prentiss' most vitriolic speech, while in Congress, was directed against a quarrelsome member, who, he conceived, was trying to force another member into a duel. But he voted against the anti-duelling law. While in Washington his private life was of a part with his previous course in Mississippi; he was often one of a company of roisterers, and was a frequenter of the gaming tables. But he refused to receive mileage for the contested term of his service. When he returned to Mississippi, his political life was practically closed. He was subsequently made the Whig candidate for the United States Senate. But Mississippi was again hopelessly Democratic, and the nomination was merely honorary.

Just at the end of his work in Washington, Prentiss was summoned, at the call of friendship, to take part in the most famous of his criminal cases. Judge Edward C. Wilkinson, a personal friend, and a prominent figure at the bar and on the rostrum in Mississippi, had gone to Louisville to marry and bring home his bride. He was accompanied by his brother and a young man who was his ward. An ill-fitting suit of clothes brought on a quarrel with the tailor, which that worthy and his cronies renewed in the lobby of the Galt House, the scene of so many bloody tragedies. The Mississippians drew their bowie-knives. The tailor's party were variously armed. A general battle ensued, in which

the Kentuckians kept the field by sheer weight of numbers, but with the loss of two of their party killed. Wilkinson and his friends retreated, mutually succoring one another, and all slightly wounded.

One of the men killed in this unfortunate affray was very popular among the lower classes in Louisville. A large crowd attended his funeral. The newspapers joined in denouncing Mississippi braves and fire-eaters. The social pretensions and slave-holdings of Wilkinson and his friends were used as arguments against them. So bitter was the popular outcry, that a change of venue was obtained, and the case was set down for trial at Harrodsburg. Meanwhile the Mississippians were admitted to bail, and the marriage came off at the appointed day. Wilkinson indeed offered to release his fiancée, or at least to postpone the ceremony. But she emphatically refused, replying to his note with the lines of the then all popular Moore:

I know not, I ask not, if guilt's in that heart,  
I but know that I love thee whatever thou art.

A few days before the day set for trial, Wilkinson returned to Louisville. He had engaged well-known Kentucky lawyers as counsel of record; his main reliance, however, was on Prentiss, who, by letter, had promised to appear for him, but from whom he had since heard nothing. His concern was the greater since he knew the prosecution had engaged the ser-

vices of Ben Hardin, the greatest criminal lawyer of the west. On the last possible day of grace, a friend reported to the anxious Wilkinson that a steamer was putting in, and that either a fight or a frolic was taking place aboard her. It soon appeared that Prentiss and some boon companions were the source of the uproar. This company adjourned to the Galt House, where the revelry was protracted into the small hours of the morning. To Wilkinson's inquiries, Prentiss answered that he was busy. The lawyer and his client had no conference until the next day, when they had settled themselves in a hack to be driven to Harrodsburg eighty miles away. Prentiss then said: "Now, Wilkinson, tell us all about the affair." Wilkinson did so, assisted by rapid and intelligent questioning. This was Prentiss' first acquaintance with the true particulars of the case. The party arrived in Harrodsburg in due time. As Prentiss stepped from the hack, Hardin, who was at hand, grimly remarked: "I know now what I've got to meet."

When the case was called, Prentiss was again missing. After some trouble, and an adjournment of half an hour, he was found and brought into court. The only one of Prentiss' many legal arguments which has been preserved in full is his address to the jury at this criminal trial. The argument is masterly and eloquent, setting forth with singular clearness his client's view of the facts, and probing every weakness in the case of the prosecution, while

its sarcasm and invective are overpowering. It was heard with irrepressible applause, and was entirely successful, though Hardin made one of his greatest speeches in reply, and appealed to every passion and prejudice which could make against the prisoners. Wilkinson and his friends were found "not guilty," in fifteen minutes, amid the applause of the courtroom. And Prentiss, after refusing to accept any fee, took passage back to Louisville, jesting and carousing on the way with some of the very state's witnesses whom he had most bitterly excoriated in court.

Returning to Vicksburg, to the bachelor quarters which he had drolly named "Cub Castle," Prentiss again took up the steady practice of his profession. This was now larger than he could conveniently handle, but it was his custom to leave the details to his associates, reserving his own powers for the courtroom. He was engaged in many celebrated cases, among which may be noted Ross vs. Verner and Cowden vs. Dobyns, the fame of which penetrated beyond the borders of Mississippi. The first named case involved the question of slavery. One, Isaac Ross, had willed his slaves to the American Colonization Society to be sent to Africa and freed, and the heirs sought to break the will as against public policy. Prentiss appeared in support of the will, which was sustained. In Cowden vs. Dobyns, a holographic will was under-written with words intimating a *pro tanto* revocation. But the revocation ended in the midst of a sentence, part of the sheet having been

torn off. The contestant was the testator's son. In the course of his speech, Prentiss, who supported the will, paid so eloquent a tribute to the deceased, that the son, after the unsuccessful termination of his suit, went to him and said: "Well, Mr. Prentiss, you have succeeded in blasting my prospects, but the beautiful tribute you paid to the memory of my father almost compensates me." It was after this trial that the opposing counsel said: "Prentiss, how does it happen that you make your very best speeches when you've got neither law nor facts to support it?" To which Prentiss replied: "Some fools in the world think it's the speech in the case that wins, and where they've got such a one they send for me, and I'm forced to speak, for there's nothing left for me to do but speak." This statement was not far from the literal truth.

In 1840, the strangest presidential campaign ever conducted in the United States found Prentiss at his best. The Whigs had nominated General William Henry Harrison. The pioneer antecedents of the old soldier were the real cause of his election. Little log cabins "with the latch-string on the outside of the door," cider-barrels, with the gourd appendant, coons alive or stuffed, coon-skin caps and home-spun garments were some of the insignia by which the Whigs attracted the masses to their candidate. To the back-woodsmen and river-boatmen of Mississippi these emblems were peculiarly attractive; and the countryside rang with the chorus:

Tippecanoe and Tyler, too,  
And Van, Van, Van, is a used-up man.

Prentiss had been aggrieved that his favorite, Clay, was passed over for the frontier general. But he soon caught the spirit of the movement, and became its foremost champion. His fame as a speaker was at its height, and the demand for him was universal. He spoke at St. Louis, Chicago, Detroit, Cleveland, Buffalo, Syracuse, New York, Newark and Portland, and, of course, at Gorham. Worn out, he finally took to shipboard for refuge. But at New Orleans, he was seized and forced to speak again. Harrison was elected, and Mississippi gave him three thousand majority.

It was at this time that the wearied orator wrote in a letter to a friend: "If I could find a woman I loved and who loved me, and had nothing else to do, I might follow your advice and marry." The words were prophetic. Prentiss had always shunned women. Morbidly sensitive on the subject of his lameness, he sedulously avoided a sex to whom he imagined that he must appear an object of pity or contempt. His friends had often sought to lead him into female society, but with scant success. On one occasion, indeed, in Washington at an official ball, attracted by the beauty of a girl, he allowed a friend to introduce him. Unfortunately, she was just rising to dance, and Prentiss' cane became entangled in the train of her ball-dress. The awkward moment that ensued was unspeakably mortifying to the lame

man, who made his escape as best he could, and sought no further introductions. But a change had now come over Prentiss. Always a man of strong domestic attachments, his irregular course of life must have become distasteful even to himself. And, in 1841, he was married to Mary Williams, the daughter of a widow living on a plantation below Natchez. Prentiss' wife was a beautiful girl, whose influence checked, if it did not altogether prevent, the excesses to which her husband had been so strongly addicted. "Cub Castle" was abandoned; and the newly wedded pair took up their quarters in the more pretentious mansion of "Belmont."

Prentiss was in more need of the sympathy and support of a wife than he himself knew. The misfortunes, which in a few years sent him to his grave a ruined and broken man, were gathering fast about him. The first blow was not long deferred. The State of Mississippi had cheerfully issued bonds to guarantee the stock of the Union Bank. But payment was another matter. To the horror of all the better class of citizens, a demagogic governor announced his intention to repudiate the debt, and an ignorant or dishonest constituency gave him loud support. Prentiss had always taken a peculiar pride in his adopted State. His speeches show devotion and reverence for an idealized Mississippi. The proposed repudiation roused him to his mightiest efforts. For three years he led in a hopeless fight, exhausting all the resources of his eloquence. Failure came to

him as a deep, personal grief. And he never regained his former buoyancy of spirit.

In the Polk-Clay campaign, Prentiss was again active. Overjoyed at Clay's nomination, he attended the candidate in his progress, but refused to speak in Clay's presence, saying, in the language of the card-table: "You can't expect me to take a hand in this game when he holds two bullets and a bragger and has the age on me to boot." He was summoned, however, to take the lead in Tennessee, which, as Polk's own State, the Whigs were making every effort to carry. At Nashville, he made one of his greatest speeches, but at its culmination was seized with a stricture of the chest, and fell fainting into the arms of Governor Jones, who exclaimed in his enthusiasm: "Die, Prentiss, die! You'll never have a more glorious opportunity."

This attack and a subsequent seizure while speaking at Natchez, warned Prentiss that outraged nature was at last preparing to take her inevitable revenge. It had always been his boast that his health was un-failing, and that, even after a night's debauch, he could rise from an hour's sleep clear-eyed and clear-witted for the duties of the day. This boast he would make no more. He did not, however, forsake his canvass. The contest was a bitter one, and a personal element had been injected when Prentiss' denunciations were met by the sneer that "Prentiss lecturing on morality was like Satan reproving sin." He went to Rodney, the scene of his early struggles,



and spoke with his usual passion. At the height of his address, when he was holding together two documents, one an abolitionist screed and the other a pro-slavery defiance, and calling them "the acid and the alkali vanishing into frothy nothingness," he hesitated, stammered and fell. He concluded his speech later in the day, but he was plainly wearied and broken. At the close of the canvass he made a still famous set speech avowing and championing the doctrine of protection. He was greatly grieved at Clay's defeat. To his wife he wrote: "I have abandoned all political ambition, and nothing but a sense of duty can induce me to take any part in politics."

A heavier and more personal misfortune was impending. It will be remembered that Prentiss' fortunes were builded upon his purchase of the "Commons" in Vicksburg from the Vick heirs, and that the validity of his title was based on the decision of the Mississippi courts that the daughters of Vick had no claim thereto under the will. Several of the daughters were residents of other States, and, as such, brought proceedings to test their claim in the Federal Courts. Unsuccessful below, they appealed. The Supreme Court sustained their contention, and reversed the court below. Thus all Prentiss' possessions were swept away in a night, with a calamity as swift and complete as that of the patriarch Job. In a way, Prentiss' financial destruction was even more complete, for he was head over ears in debt. He had spent large sums in improvements upon his

lost city property. In the days of his seeming prosperity, he had been lavish. It was one of his amusements to roll silver dollars down the sidewalk that the negro boys might scramble after them. To his friends, his purse was always open. And it appeared that his liabilities, as a security alone, came to nearly one hundred thousand dollars. So reckless had he been in this respect that he had been known to sign his name as endorser on notes for blank sums, stating in reply to remonstrances, that the maker was a friend who had assisted him in his poorer days.

In the utter wreck of his fortunes, Prentiss took a radical and characteristic step. He was disgusted with Mississippi. The fair name of the state was dishonored by repudiation. Former friends, who could not repay his loans or take up their worthless paper, shunned him, and a legion of duns besieged his premises. With the nerve of a born gambler, he decided to transfer his residence to New Orleans. This involved an entirely new course of study, for Louisiana had adopted the civil in preference to the Anglo-Saxon, or Common Law. But in no wise daunted by this, he pursued his new studies with such success that he passed the State Bar Examination and was admitted to practice in Louisiana before the Supreme Court of that State in the Fall of 1845, being then thirty-seven years of age. To his friends he said that he was satisfied to get out of Mississippi as rich as when he entered it, and that his only regret

was that he had not made the change ten years earlier. It was soon after this change of base that he made one of his most famous addresses; that before the New England Society on the anniversary of the landing of the Pilgrims. It is to be found in collections of American eloquence.

At New Orleans, Prentiss spent two busy years, toiling with desperation, and the consciousness of failing strength, to lessen the load of debt that weighed him down. "What a jubilee I would have," he wrote, "If I could once again stand forth and say: 'I owe no man a cent.'"

His increasing family, for he had already four children, were an added responsibility, but his domestic life in this period of misfortune was a happy change from the irregularities of his wilder days. In a year, he had so well mastered the Civil Law that he was offered the Chair of Law in the State University, an honor which his circumstances compelled him to decline. In the course of his practice he met with one misadventure. In a case involving an alleged fraud, he administered a savage "skinning" to the opposing party, and was formally challenged by the latter's son, a gallant and precocious young gentleman of twenty. The worst of it was that the challenger was the grandson of the adored Henry Clay. Under these circumstances Prentiss was anxious, if possible, to avoid a meeting. After a number of solemn sessions, and the unraveling of several miles of necessary red-tape, all of which was

duly chronicled to the newspapers, the seconds succeeded in arriving at a point where, by the making and acceptance of a qualified apology, the honor of all parties was pronounced intact. It is gratifying to learn that the great Henry was much pleased at this conclusion of the affair, and so expressed himself in a letter to Prentiss. Another event occurring during this period was the Taylor-Cass election, wherein Prentiss once more labored for the Whig candidate, speaking to the limit of his powers, and contributing not a little to his party's success.

In the winter of 1848-9 the cholera swept New Orleans. Prentiss contracted the disease and narrowly escaped death. Recovering, he went for a last visit to Maine. His family noted with concern that he was worn and thin, and that his hair had turned gray. On his return to Louisiana, he was ordered to rest, but refused, saying: "One cannot make a summer campaign north without pecuniary ammunition." To a friend he said: "I see that my appearance shocks you. Don't you think that I am nearly ready for the shroud and coffin?" At this time he made one of his greatest legal arguments, in the case of "Pultney's Heirs vs. City of Lafayette." Being too weak to stand, he spoke seated in a chair.

His last public address was at the anniversary day of the New England Forefathers, where he spoke from the toast: "May the time never come when a citizen of New Orleans shall find himself a stranger in Boston, or a citizen of Boston be a foreigner in

New Orleans." An invitation to deliver the first annual address before the Story Law Association of Harvard University he was regretfully obliged to decline.

Taken ill again, he chafed against his enforced idleness. "Why, good sirs," he said to his physicians and friends, "a man cannot lie in bed and make his living." Up again, he threw himself into his work with desperate energy. His wife was sent to her mother's home with the children. Every expense was curtailed, and every effort was directed to lessening the load of debt.

Among the matters in his charge was the defense of Lopez, the Cuban revolutionist, who had been arrested at the instance of the Spanish consul and held, under the neutrality acts, on the charge of preparing an armed expedition against the Spanish colonies. Prentiss attended in court and made his usual able argument, but fainted at its close. Carried to his hotel, he again fainted. The cholera returned; notwithstanding which, he made an effort to go to his office, only to faint again at the door. He grew worse, and at last consented to abandon the idea of renewing work, and to go to his wife's home. In a few hours his only fear was that he would never arrive there alive. He made the journey on a mattress. From the start it was apparent that there was no hope. His body was worn out. As one of his friends said: "Nothing is left of him but his grand two-story head."

During his illness he raved incessantly of his far New England home. Toward the last he expressed deep grief at his past life, saying that he had been desperately wicked, and that it was impossible that he should be forgiven. Urged to put his trust in God, he became calmer. Some time later he was heard to say: "O God, the Son," seemingly in partial recollection of those lines of the Litany: "O God the Son, Redeemer of the world, have mercy on us miserable sinners."

On the last day of June he asked his wife to sit at the foot of the bed where he could see her when he awakened. Her name, "Mary," was the last word he uttered. Soon after he fell into a quiet sleep from which he never woke. A large concourse attended at his grave.

Seargent Smith Prentiss was unquestionably that rare thing, a genius. At his death he was but forty-two. In twenty glorious and crowded years he had conquered two systems of the elaborate science of the Law; had risen unaided to the leadership of two Bars; had astonished the halls of Congress; and, in the days of Webster, Clay and Calhoun, had made his name a synonym for eloquence from Maine to Mississippi. As a natural orator he has rarely, if ever, been excelled. In this he was largely assisted by the fact that he was without fear of any tribunal or audience. Conscious of his powers, he stood a peer before any court or assembly. His openings were artful. Even an unpopular cause he rarely

failed to twist so as to enlist the sympathies of his audience. It was always the weakest point in his antagonist's line that was attacked. Once fairly launched he was carried along by his own momentum. His wonderful memory supplied him with continual material, which his brilliant fancy threw into graceful figures or pointed into telling illustrations. He seldom or never wrote out his speeches. When he did so they were the merest dry bones. Nor could he ever reproduce them after delivery. He depended upon the inspiration of the occasion. To a friend he once said :

When I get to speaking and become excited, I'm like a little boy walking through a meadow, when he sees a beautiful butterfly, with its gauzy wings of gold, and starts in pursuit, eager to capture the glittering prize. In the race, up springs another and still another until the whole sky is filled with beautiful butterflies, every one brighter than the other. It's so with me; every fancy starts a new one, till in the pursuit my whole mind is filled with beautiful butterflies.

Some of his most remarkable efforts were altogether impromptu. One was delivered before a party of friends from the summit of an Indian mound, taking the mound and its contents for a theme. At another time, in New Orleans, at a public meeting called to raise funds for a statue to Benjamin Franklin, and attended chiefly by the artistic and literary class, he took the floor on a sudden call, and paled the efforts of the speaker of the day by an amazing discourse upon the art and religions of Greece and Rome. The hall was soon resounding

with applause, and crowded with those drawn in from the street by the uproar. A friend in passing heard, and said to another: "It must be Prentiss."

The most emphatic testimonial to his greatness as an orator comes from the newspapers which strove to describe his efforts and their effect. With one accord their language is extravagant and fulsome, almost to the point of absurdity. The writers speak as men dazed. And this was true not in the South alone, where little was required to "fire the southern heart," but in colder Maine and Massachusetts. Boston, Portland and New York were as swept and moved by his words as Natchez and New Orleans.

In spite of his physical deformity his appearance was striking. His head was large, and the effect was increased by wearing his hair at the popular length. His features were sensitive and pleasing. His eye was large, singularly clear and bright, and when in action grew red with the excitement of the moment. As he came to the front, the well-known "clump, clump, clump" of his cane silenced and fixed the attention of his audience. Then came the silvery voice with its alluring opening sentences. In moments of passion he would throw back his face, give a rapid shake of his head in advancing, and begin with a roar that made good his leonine appearance. His terrible satire and invective were compared by an adversary to "one long roll of battle."

He was never taken aback by any incident however untoward. His retort could be polished or



rough according to the tastes of his audience. He was at all times ready to pause and reply to an interrupter. As a specimen of his readiness, the following may serve. On one occasion, during a political campaign, he addressed a back-woods audience from the top of the hyena-cage of a traveling menagerie. The thumping of his cane excited the beasts, which began to howl. But above the din could be heard the dominant voice of Prentiss crying: "Listen, fellow citizens! Hark how the very beasts of the forest utter their condemnation of this great Loco-foco outrage upon your dearest and most cherished rights."

As a lawyer Prentiss was a barrister pure and simple. The attorney's work he left to his partners or associates. His specialties were the Law of Real Estate and of Wills. So well did he know the former, that it was the custom to employ him merely to come into court and make a speech. He seldom used books, or prepared for such cases, preferring to hear the evidence in the court-room and speak from the knowledge so obtained. This habit he sometimes carried into cases in which he was more regularly retained. The most astonishing feats of this kind are remembered of him. On one occasion before the Court of Errors and Appeals, he came in late and unprepared. His associate read the record very slowly, and Prentiss immediately arose and made a close and successful argument. On another occasion he was called from Vicksburg to deliver an

argument in what seemed a hopeless land case. He did not arrive on the day set, and the High Court was prevailed upon to grant the extraordinary privilege of a day's adjournment. A messenger was dispatched, and Prentiss was taken from the poker table. Arriving, he demanded all the papers in the case, and shut himself up with these, a bottle of champagne and a bottle of whiskey. In the morning he failed to respond to knocking, and his door was forced. The bottles and papers covered the floor, and Prentiss lay along the bed. He was dragged up, and given over to his faithful body-servant, "Colonel Burr," who proceeded to bathe and walk him until court was called. Punctually on the hour he was brought to the bar, and then and there delivered an address which covered all the fine and complicated points of the suit, and won his case. He had honestly read and studied all the papers in the suit before he permitted himself to over-indulge in the contents of the bottles. It is needless to say that such haphazard measures were not always successful. On one occasion Prentiss having appeared unprepared before the Supreme Court in an important case, the presiding judge noticed his confusion, and adjourned court. That night, by the judge's advice, he went over the records, and, on the following day, argued in his true form.

For the vices which clouded his fame and embittered his later years, they were offenses against himself alone, except in so far as his example was of effect upon society in general or particular. It may

be said that the day was one of hard swearing, hard drinking and hard gambling, and his life was for the most part spent in a new and boisterous community, where such lapses attracted less attention for singularity than they might have done elsewhere. But it is to be regretted that they have made the story of his life to some extent a narrative "to point a moral or adorn a tale."

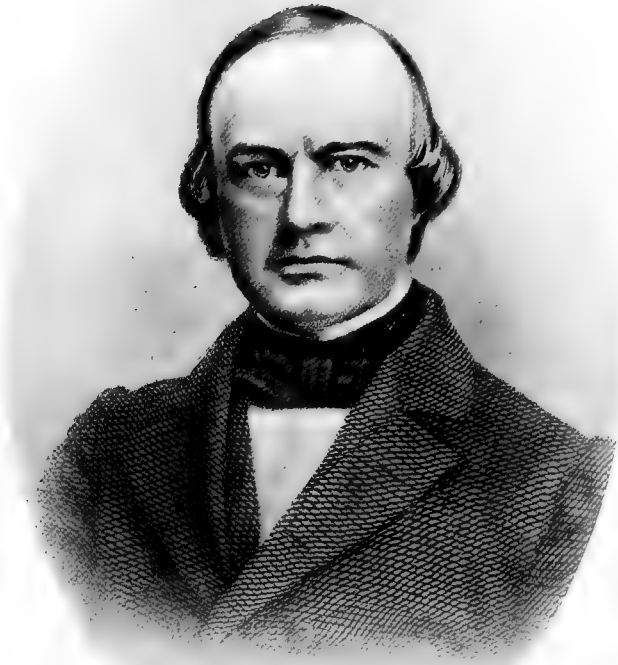
BENJAMIN ROBBINS CURTIS.



BENJAMIN ROBBINS CURTIS

From an engraving by F. T. Stuart.









# BENJAMIN ROBBINS CURTIS.

1809-1874.

BY

JOSEPH BANGS WARNER,

*of the Massachusetts Bar.*

THE fame of the practising lawyer is proverbially brief. Even a judge seldom secures an enduring name, and rarely then but by decisions which determine great matters. It is the singular fortune of Judge Curtis to have built his monument not by decisions but by a dissenting opinion which has left no abiding imprint on the law and yet stands out a conspicuous landmark in the history of a troubled time.

Benjamin Robbins Curtis was born November 4th, 1809, at Watertown, Massachusetts, a river-side village within the suburban radius of Boston. He came of good English stock, already for nearly two centuries at home in that neighborhood. No field could have better supplied the elements needed to produce a character of the type which Curtis exemplified than a community with the history and habits of eastern Massachusetts. It was foreordained for the nourishment of a mind which, if it did not accept the universe in terms of the constitu-

tion and the common law, should at least find those terms sufficient to keep the body politic safely in its orbit. In the remote background were the sober Puritan conscience, the Puritan's individual revolt against imposed authority with a corresponding reverence for the law which he himself should make, his passion for theology, his training in discussion, his practical shrewdness, his responsibility in politics, and also his limitations, inevitable in a life passed far from the main currents of European culture and without close contact with the more complicated development of other peoples. In the foreground was the Unitarian controversy which had recently shaken the community with theological discussion and had left its results in an advanced individualism and a reliance on the sufficiency of rational argument to dispose of all problems. Certainly these conditions might be relied on to produce not only controversial theologians but lawyers of a not dissimilar cast of mind. That the productive power of this environment may not be too narrowly conceived, however, it is to be remembered that if it furnished the clear and expository Curtis it threw off as well the brilliant Choate, an advocate governed by impulses seemingly foreign to anything that his native soil could supply, as incalculable in his sudden strokes of power as Curtis was rational in his deliberate processes.

Curtis's father was a ship-master, whose foreign voyages left his two children solely in the hands of

a young mother until his early death threw them wholly upon her anxious care with but the slenderest means of support. It was by her self-sacrificing efforts, as the brother tells us with filial gratitude in his memoir of Judge Curtis (a book from which are drawn here facts nowhere else accessible), that education of a homely kind was provided at near-by schools for the children, and Benjamin was spared the severer privations which we are accustomed to find in American biographies as the prelude to great achievements. It is plain, nevertheless, that it was only by making the most of every available book and seizing every opportunity that education was attained in that frugal household. However, young Curtis was landed in Harvard College at the age of sixteen, and after four years of such thin nourishment as the College then provided he was graduated in 1829 with a class illustrious in college history for its distinguished members. Nothing especially significant is recorded of this preparatory stage of Curtis's life, though it is interesting to see that even his earliest essays, beginning with school efforts, have the grave, reasonable poise and explanatory tone which indicated the quality of his mind, and suggest that he never had a youthful exuberance of fancy to suppress, and perhaps no insubordinate impulses of any kind to disturb his mind in its methodical action. On graduating he entered at once the Harvard Law School, which was just starting into new life at the coming of Judge Story, and there the

young student found the strongest stimulus and the best opportunity that this country had ever offered for the study of law. But on these congenial surroundings Curtis turned his back after a year and a half and hurried into a country town to begin practice, a proceeding which seems inconsistent with his tastes and his usually carefully-considered purposes but which has its explanation in the attraction of a young lady and the hope of a speedy marriage. He went back to Cambridge, however, the next year for another term at the Law School, then married, and two years later, in 1834, abandoned the country practice and returned to Boston, where on every account he belonged. He secured at once an advantageous connection with a lawyer of established business, and at the age of twenty-five, already mature, with a gravity of demeanor and a prepared mind which carried with them the influence of middle age, he began, in favorable surroundings, the professional life to which he was plainly predestined. He seems to have been admitted, almost at once, into the established order of that conservative community, and, unaided by any conspicuous turn of fortune, and needing none, he was quickly accepted at the valuation which his own powers quietly demanded for themselves. He became a leading lawyer in a bar notably strong in talent and learning. Here for seventeen years, until his elevation to the bench, he held an assured place which was soon in the very front rank. His professional occu-

pation in office consultations and in courts, both state and federal, was varied and included two branches which have since become too specialized to form longer a part of a general practice, admiralty and patents. The pressure of responsible work gradually became heavy and incessant. He is recorded as counsel in one hundred and thirty-eight cases reported in the Supreme Judicial Court of Massachusetts during the fifteen years prior to his going to Washington, and this besides cases argued in the Circuit Court of the United States, constant *nisi prius* trials in the state and United States District Courts, and unremitting chamber practice. He became conspicuous throughout New England for the acknowledged value of his advice and opinions, the amplitude of his learning, and his commanding power before courts and juries.

His characteristics as exhibited during this period may stand as the permanent expression of his nature so early did he reach his full development, and so definite and constant was the control of the voluntary and rational processes of his mind over the entire man. Little, either to hinder or to help, was left, for the accident of circumstances, the stimulus of emergency or the heat of imagination. Whether at thirty or at sixty, at the bar or on the bench, in court, in chambers, in speech or in print, in public affairs or in private business, he was essentially the same,—prepared, exact, exhaustive. His temper, his manner, his personal traits, his physical bearing,

all seem to have been consistent and all subject to his calm and practical reason. His power lay in the clearness of his exposition, which is of course only the outward evidence of clear thinking. Webster said of him at the age of forty, "his great mental characteristic is clearness; and the power of clear statement is the great power at the bar." In spite of the absence of adornment of language and the severe concentration of his arguments he never failed to command the close attention of every one capable of appreciating reasoning, and he addressed no one else, for conviction was his one object. Of rhetorical eloquence or wide imaginative illustration he was not capable; but orderly argument is an art which carries its own charm if set off, as it was in Curtis, by a happy choice of words. The solid thought, the progress of argument by marked and natural stages, the absence of repetition, the confidence, soon imparted, that prolixity was not to be feared, and the satisfaction which is always aroused and renewed when questions are first candidly stated and then wholly answered, these features, sustained by the fascinated interest provoked by watching an easy dexterity in the use of difficult tools, kept his hearers at the needed tension and left them settled in conclusions which had become their own. Speech fell from his lips and arranged itself in balanced sentences and ordered sequence as if previously prepared in print, yet without rigidity and with the directness proper to *ex tempore* utterance. In de-

portment he was calm, grave and judicial. Every process, physical and mental, seemed measured and easy.

Such is the picture preserved in the memory of his contemporaries in the place which knew him best. To fill it in with details of his professional work would only be to give a typical and familiar representation of the life of the successful lawyer, immersed in causes, turning in quick succession from one court to another, crowding the brief intervals with office work, indispensable to his clients, growing in authoritative influence in affairs, his progress marked by the importance of his engagements and his place in the community definitely outlined as his character and his powers carried him into increasing eminence. That a conspicuous position was not to be won at the Boston bar on easy terms will be admitted when it is remembered that Webster, Choate, Mason, Sidney Bartlett, E. R. Hoar and W. G. Russell were, first or last, his contemporaries. The imposing figure of Chief-Justice Shaw was at the head of the Supreme Court. Probably nowhere in this country, the Supreme Court at Washington at times alone excepted, have the administration of law and the exploits of the bar been more notable or more dramatically interesting to the public. To the young attorney of the present day, to whom a great city practice may appear chiefly as the successful legal direction of mammoth business enterprises, carried on by a magnate who leaves it to juniors



to try and to argue cases, and to paid assistants to furnish law, to him the combats in which Curtis and his contemporaries made their fame as advocates seem as mediæval as the battles of King Richard in the Holy Land to the young German officer cramming engineering in the military schools.

Perhaps the most noticeable of Curtis's early cases, and one which is worth noticing from its close connection with the Dred Scott case, was that of the slave Med<sup>1</sup>, which he argued at the age of twenty-seven when he had been but two years at the Boston bar. A southern woman had come from her home in New Orleans to visit in Boston bringing with her a young colored child, one of her husband's slaves, and a writ of *habeas corpus* was issued to raise the question of the right of the mistress to exercise restraint over the child in Massachusetts. Curtis was retained by the mistress, and stated the proposition which he endeavored to maintain in this accurately guarded form: "A citizen of a slaveholding state, who comes to Massachusetts for a temporary purpose of business or pleasure, and brings his slave as a personal attendant on his journey, may restrain that slave for the purpose of carrying him out of the state and returning him to the domicile of the owner." The argument might well be accepted unchanged as one of his maturer efforts, for it has all his calm clearness and close-knit logic and something of that amplification which contributes to broaden-

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<sup>1</sup> Commonwealth vs. Aves, 18 Pickering Reports, 193.

ing and buttressing a case but which is often unattainable by persons of logical habit. He rested his case on the argument that, the slave being property by the laws of the owner's domicile, Massachusetts should give effect to those laws on the accepted principle of international law, unless to do so would require recognition of a law in itself immoral. Upon the latter point he insists that it is not abstract morality but morality prescribed by law which is to govern, and he takes occasion to interject a significant remark, which no doubt expressed a conviction that always remained strong in his mind, however much he might feel himself required to oppose the abolitionist.

I wish not to be understood to advocate slavery as consistent with natural right. I do not believe it to be consistent with natural right. If this cause or any cause required me to maintain that slavery was not a violation of the law of nature I would abandon it. . . . Your Honor's opinion as men or as moralists have no bearing on the question.

The court held that property in a slave was not a right to be universally recognized, but depended on positive local laws which were not to be enforced if repugnant to domestic laws and policy. In commenting on this decision in his opinion in the *Dred Scott* case Judge Curtis points out that, like Lord Stowell's decision in the case of the slave *Grace*, the court did not undertake to declare the relation of master and slave essentially at an end, but only prevented the master from exercising control over

the slave so long as he remained within the free state.

So far as appears, Mr. Curtis's absorption in his profession was well-nigh complete. He was, however, brought into participation in other interests by his connection with Harvard College, for he was chosen, in 1845, to fill the place in the corporation of the college then made vacant by the death of Judge Story. Nothing could have shown more emphatically the confidence which the young man of thirty-six had inspired than this selection of him for a place within the innermost circle of conservative influence. Another connection, too, which may have given him some association with liberal and elegant pursuits was his close intimacy with his father's half-brother, George Ticknor, Professor of Belles-Lettres in Harvard College. With him he kept up a correspondence and an affectionate personal intercourse with a constancy unusual even in near kinsmen.

In public matters the greater part of Mr. Curtis's life was passed in agitated times, when the uncontrollable movement of events kept him alarmed and not infrequently despairing. In the first period of his work at the bar, and until he went on to the bench, the question of slavery, which finally dragged him, unwilling, into a leading part, was in the stage of discussion which preceded the compromise of 1850. A moral principle, but partially and gradually accepted even by sensitive consciences, was

forcing its way against other things which men held invaluable—domestic peace, established law, traditions of government, friendly intercourse between the North and the South. The national habit of compromise and practice of adjustment, which are inherent in the Anglo-Saxon temper and have justified themselves by such practical success in the art of government, were put to a mortal strain. On the one hand the abolitionists, uncompromising in their allegiance to an inexorable principle of righteousness, were occupied in awakening a people whose consciences, if more tardy, were sure to be all powerful when aroused, and like other reformers they did not think it their business to wait for a more convenient season. On the other hand men accustomed to the responsibility of affairs, used to forecasting consequences and hating passion, felt themselves bound at all costs to defend the foundations of the state against disruption, whatever might be the abstract rights of a particular controversy. To men of conservative minds the importunate insistence of Garrison, Phillips, and Parker and the lofty uncompromising ethical demands of Emerson, Whittier and Channing, seemed a fanatical blindness to consequences and a reckless determination to have their own way at once and at whatever cost, while the extreme abolitionists, stung to greater intemperance by opposition, did not stop short in the logic of their creed, and were ready openly to denounce the constitution and the Union if these stood in their way.

This conflict was nowhere hotter than in Massachusetts and nowhere, except on the floor of congress itself, was the cleavage between men sharper.

It was a curious feature of this passionate struggle that it should be carried on largely as a discussion of law, and in a region not a little technical though also vaguely political,—the region of constitutional law. In such a controversy it is unnecessary to say that Curtis was where the instincts of the lawyer carried him,—with the conservatives. He was a Webster Whig, and not even Webster held with more determination that the preservation of the Union was the final aim of statesmanship or looked with more reverence to the constitution as the ark of safety.

At such a time no lawyer could have stood wholly aloof and remained of any significance. Curtis however had no taste for actual participation in politics and no inclination for office. To have gone to congress would have been repugnant to him, and to have taken part in the manipulation of party politics for any purpose would have at once involved him in a most uncongenial business. At the same time he felt a serious concern in public matters and a duty to declare such views as he might reach by private study. Accordingly he deliberately adopted the plan of taking but infrequent part in the discussion of public questions, in order that he might render so much the more effective such occasional efforts as he might choose to make. No doubt it suited, too, the judicial, almost oracular, habit of

his mind to save himself until an issue should be clearly made up and the opening of the controversy should have prepared men's minds, and then to deliver judgment. Such a plan might not have been safe for a man less sure of his ability to command attention when the moment should come; but on the few occasions when Curtis did declare himself the effect was not below his expectations, and the infrequency of his utterances probably did serve to enhance their importance. Fortune, too, favored him by reserving for him the supreme opportunity to deliver, from an exalted place and in a solemn manner, his views upon the great question when they could powerfully affect his country.

It was as a contribution to a pressing public discussion that he prepared and published in the *North American Review* in 1844, an exhaustive article entitled "Debts of the States" which was occasioned by the action of several of the states in repudiating, more or less completely, their public debts. This compact essay, analyzing the situation in each of the states whose credit was at stake, and temperately pointing the way to right conduct, is admirable in its tone of fairness and the absence of mere attack.

In April, 1850, he made an unwonted and reluctant appearance as a political orator in delivering an address of welcome to Mr. Webster, then returning to meet an unaccustomed difference of opinion after the 7th of March speech, and it was with no qualified approval that he declared his adhesion

to Mr. Webster's position. A more notable occasion, and one more strictly consistent with the plan which he had adopted concerning his part in public discussion, was his speech in the meeting held in Faneuil Hall in 1850, at the time of the passage of the compromise Act of 1850. The fugitive slave law had just been passed. Its provisions not only outraged the extreme abolitionists, but troubled many who had been slower to kindle at what they hoped was, at the worst, a theoretical wrong, exaggerated in its actual effects, and susceptible of adjustment in some way if men would not be too extreme in their denunciations. Indeed the provisions of the law,—“this infamous act which has blighted the reputation of every one who had any connection with it,” as Mr. Rhodes calls it,—might well have startled any one who considered the negro as entitled to any rights whatever. It allowed an arrest on the *ex parte* evidence even of an agent of the alleged owner, the accused being debarred from testifying; a successful claimant could remove his property with “such reasonable force and restraint as may be necessary” secure from “molestation” through the process of any court; the United States marshals were held to extraordinary responsibility for secure custody, and any person obstructing an arrest or attempting a rescue was not only subject to fine or imprisonment but was made civilly liable. This law had been received with hot indignation by the anti-slavery party, and on October 14th a mass

meeting had been held in Faneuil Hall, presided over by Charles Francis Adams and addressed by letter or voice by Josiah Quincy, Wendell Phillips, and Theodore Parker, in denunciation of the act. On the other hand this law was a part of a compromise which was welcomed as a whole by conservative men as a happy end of threatened trouble. A national salute of one hundred guns had been fired on Boston Common, "as a testimonial of joy on the part of the citizens of Boston of both political parties at the adoption of the late measures of congress," and on November 26th was held at Faneuil Hall the meeting at which Mr. Curtis and Mr. Choate expressed their approval. Mr. Curtis's address was devoted wholly to affirming the supremacy of the constitutional provision requiring the rendition of fugitives from service, and the paramount obligation to respect the law passed to enforce it, and to denouncing the lawless demands of those who counseled resistance to that law. A defense of the law as righteous he does not attempt, nor does he even allude to its provisions. It was the law; it was based on the constitution; that was enough. Any defiance of the constitution was a blow at the Union, and for such a blow there could be no justification. In face of that appalling danger the rights of a few fugitives were not to be mentioned. He said:

With the rights of those persons I firmly believe Massachusetts has nothing to do. It is enough for us that they have no right to be here. Our peace and safety they have no right to



invade. Whether they come as fugitives and being here act as rebels against our law, or whether they come as armed invaders. Whatever natural rights they have, and I admit those natural rights to their fullest extent, *this* is not the soil on which to vindicate them. This is *our* soil, sacred to *our* peace, on which we intend to perform *our* promises and work out, for the benefit of ourselves and our posterity and the world, the destiny which our Creator has assigned to *us*. So far as He has supplied us with the means to succor the distressed, we, as Christian men, will do so, and bid them welcome, and thank God that we have the means to do it. But we will not act beyond those means; we will not violate a solemn compact to do it . . . we will not plunge into civil discord to do it, we will not shed blood to do it, we will not so throw away the rich gifts which He has conferred upon us, not for our benefit alone, but in trust for the countless generations of His children.

To us, standing now upon the firm ground of rights at last established not against the law but by it, it is hard to realize that a humanitarian sentiment now universal and undisputed, was but lately a new force, bewildering men who saw in it, and not without reason, a menace to the safety of themselves and the security of their government. But it was not strange that Curtis was alarmed when Theodore Parker could declare from his pulpit that if he were to sit upon a jury to pass upon the guilt of "Greatheart" accused of aiding the escape of a slave, the law and the facts being conclusive against the accused, and it remained for him to declare the prisoner guilty, "If I have extinguished my manhood by my juror's oath then I shall do my official business and find "Greatheart" guilty, and I shall

seem to be a true man; but if I value my manhood I shall answer after my natural duty to love a man and not to hate him, to do him justice, not injustice, to allow him the natural rights he has not alienated, and shall say, 'Not Guilty,' then men will call me foresworn and a liar, but I think human nature will justify the verdict."

In 1851 Mr. Curtis became a member of the Massachusetts Legislature, not from any desire to be in public life, even to this limited degree, but consenting to it chiefly in order to bring about some reforms in the judicial procedure of the state. His service as legislator was the occasion of an address to the people of Massachusetts, drawn by him and signed by his fellow Whigs in the house, protesting against the coalition between the Free-Soil members and Democrats which was planned by the former to secure the election of Charles Sumner to the United States Senate.

What has been described above comprehends the public activities of Mr. Curtis up to the time of his going to Washington. It was inevitable that such a man, not only cast at birth in the mold of conservatism but trained by exclusive study to legal habits of mind, should have been dismayed at the prevailing defiance of what was undeniably law, and the readiness of patriotic men to dissolve settled peace and order. His life, throughout nearly its entire length, fell in times which ran counter to what was organic in him. Now that the issues have been

settled, there may be a temptation to think of the men who tried to prevent the inevitable struggle as engaged in a vain resistance to progress, clogs on the wheels, mistakenly and uselessly obstructive, like the loyalists in the revolution. Nothing could be more unjust. Not only was their conservatism of inestimable value in moderating too reckless action, but when it is remembered that it was the insistence that the Union should be preserved, not a demand for the destruction of slavery, that inspired the North throughout the war, the value and influence of the men who stood stoutly on that principle from the beginning may be appreciated. In Curtis's case it must be remembered, too, not only that it was his steadiness that held the outpost in the Dred Scott case, but that when the conflict actually came, though still solicitous, as we shall see, for the sanctity of law, he was on the side of a vigorous prosecution of the war and sent his son to support the government.

In 1851 the death of Mr. Justice Woodbury made a vacancy in the Supreme Court of the United States. Mr. Webster, who was the Secretary of State, wrote at once to President Fillmore:

The general, perhaps I may say the almost universal sentiment here is that the place should be filled by the appointment of Mr. B. R. Curtis. Mr. Choate is perhaps Mr. Curtis's leader, and is more extensively known, as he has been quite distinguished in public life. But it is supposed he would not take the place. He must be conferred with and I should have seen him to-day, but he is out of town. . . . Mr. B. R.

Curtis is of very suitable age, forty-one; he has good health, excellent habits, sufficient industry and love of labor, and, I need hardly add, is in point of legal attainments and general character in every way fit for the place.

The President had indeed anticipated this advice by suggesting Mr. Curtis, and, Mr. Choate concurring in the recommendation, Mr. Curtis was appointed.

There could have been no occasion for hesitation about his conspicuous fitness for judicial work. No man could have been more indisputably qualified by temperament and habit of mind, or better prepared by experience; and he took up the new office with ease. The change brought him a marked diminution of wearing work. "The great difference," he wrote, "between my professional labors at the bar and on the bench consists in the entire freedom of the latter from anxiety and burdensome responsibility, and the certainty when I rise in the morning that no one can force me to do anything which I am not equal to"—a view of life on the bench which could hardly be universally subscribed to by modern judges. So much of leisure did Mr. Curtis find at his disposition in the vacations between terms of court that he soon undertook the project of editing the decisions of the Supreme Court of the United States, then published in fifty-seven volumes, and this he did with great care and accuracy, remodeling each report, writing his own head-notes for each case, at least in the Peters' and the Howard's series, and

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adding a digest of the whole, producing a standard edition now in general use.

Shortly before his appointment he had bought a country place at Pittsfield, Massachusetts, and here he gratified in his vacations a taste for country life and farming for which he had an aptitude. This seems to have been his only recreation and it did not come until he had reached middle life.

Of Judge Curtis's work on the bench there has never been but one opinion among lawyers. It carried from the outset an exceptional authority from the convincing force of his explanatory arguments, the thoroughness of his research, and above all from that vigorous and almost aggressive impartiality which is instantly felt in the handling of causes as something different in kind from the merely colorless neutrality which is taken for granted as the least that any judge will exhibit. And at no time was this force, which is one of robust moral character as well as intellectual self-reliance, more needed than in that troubled period, when, as may at any time happen in our American system, political controversy of the most agitating and even threatening kind found itself centered about the purely judicial action which courts were called on to take in private causes between individual litigants. To consider and dispose of such controversies at such a moment demands something more than the judicial calmness which is the traditional atmosphere of the court room. The judge is required to know and ap-

ply political principles far different from abstract legal doctrines, and to appreciate political bearings, and even forecast political results, which take him into the region of those very passions which it is his business not to feel. He must have a political knowledge and a political sense while he is forbidden to have a political bias. Such is the demand which is made upon a court which has at one and the same time to interpret the constitution as a legal instrument and feel its meaning and know its operation as a political arrangement. In no other system of government has judicial work such a character, and in no other does it demand the particular kind of large, practical and virile grasp of affairs which is a necessary part of the equipment of a great judge applying constitutional law. Those demands Judge Curtis, by the unanimous opinion of his contemporaries and the subsequent judgment of history, fulfilled.

Almost his first causes, arising at *nisi prius*, before he had taken his seat at Washington, involved him in the unavoidable question of slavery. The Fugitive Slave Law was not likely to be easily enforced in the community where Emerson had referred to it as a "A law which everyone of you will break on the earliest occasion—a law which no man can obey, or abet the obeying, without loss of self-respect and forfeiture of the name of gentleman." The rescue of the slave Shadrach entailed the trial of one of the alleged rescuers before Judge Curtis,

and called for a ruling on the question whether the jury should be judges of the law as well as of the fact, and this ruling the court gave against the prisoner in a carefully-considered opinion. Even more dramatic was the attempted rescue of the slave Anthony Burns in May, 1854, by an attack in which some of the leading abolitionists joined, and the resulting indictment of Wendell Phillips and Theodore Parker for inciting the attack by speeches made in Faneuil Hall. Judge Curtis had made sufficiently clear, more than once before he went on the bench, his disapproval of Mr. Parker's general attitude. When the trial on one of these indictments was had before him he volunteered an intimation that the indictment was defective in a point which the attorney for the accused had not observed, and ordered the indictment quashed, not, however, to the satisfaction of Mr. Parker, who by no means wanted his trial to be abandoned. One of the leaders of the "mob" of rescuers, who still survives, has told the writer of these pages that the abolitionists had perfect confidence in Judge Curtis's fairness toward them on the bench, and that he himself had always felt that the particular disposition of the indictment in the manner described was almost an act of strained protection of the accused,—though this need not be assented to.

During the six years while Judge Curtis was on the bench of the Supreme Court he wrote opinions in fifty-one cases. This average of less than nine

each year certainly did not make an oppressive burden. The number of cases reported in the nine volumes which cover these years is less than one-fifth of those in the score and more of volumes which represent the present activity of the court for an equal period. In a letter to Mr. Webster, Judge Curtis declared his opinion that, in comparison with the work of writing opinions, "a far more difficult and useful field of labor, speaking generally, is the safe, prompt, judicious and wise controlling power of a judge on the circuit," and he foresees with apprehension the time when the necessities of the country may prevent the justices of the Supreme Court from coming directly into contact with the people on the circuits and applying the law to evidence of facts. He adds, "I presume you will agree with me that there is no field for a lawyer which, for breadth and compass and the requisitions made on all the faculties, can compare with a trial by jury."

It is doubtful whether Judge Curtis ever much enjoyed his work on the bench, and considering his eminent fitness for it, it is rather strange that he did not. The narrowness of the salary, with the sense that he was making no accumulation for the needs of himself and his family, was a cause of constant anxiety, and probably life in Washington was not then any too comfortable. Some years later he said: "Washington was always a fatiguing place to me, even when it was a fresh scene and the place where I had ambitions;" and he added, "now that I have



grown wiser, and have none, in the usual acceptance of the word, . . . this city is very dreary to me." This rather despondent tone indicates, what was undoubtedly true, that Judge Curtis's temperament was not buoyant and his views of life, naturally somber, were evidently not enlivened by anything in judicial life. So far as any desire to be in Boston was concerned he did not hesitate to express his want of sympathy with the men and opinions then controlling in that city, and declared himself so tried with Massachusetts opinion and actions that he scarcely wished to see a Boston newspaper. It was in 1854, when he had been but three months on the bench, that he wrote to Mr. Ticknor complaining that the judges of the Supreme Court, while exposed to attack such as no honest judiciary in any country known to him had been subject to, had not the consideration and support to which they were entitled.

Their salaries are so poor that not one judge on the bench can live on what the government pays him, and the legislative branch of the government are not friendly to them. The people . . . are ready to listen without indignation to the grossest charges against those who administer the judicial power. . . . It has been and is a matter of grave doubt with me whether I will longer continue to occupy the post I now hold. I can say with entire sincerity that if I could see an honorable retreat from my post open to me, from which the country would take no detriment I would not hold it longer. Whether I shall continue to do so I do not now know.

In March, 1857, the case of *Dred Scott vs. Sandford* was decided. It would be impossible, within

the limits of this brief biography, to analyze the elaborate opinions given in that case. A few words of general statement to recall the once familiar facts may not be out of place. The plaintiff had been a slave in Missouri, was taken by his master, a surgeon in the army, first to the free state of Illinois and later to Fort Snelling, in what was then the territory of Wisconsin, held there as a slave for two years and then taken back by his master to Missouri. He contended that he had acquired his freedom by his stay within the free state, or within the territory where slavery was forbidden by the law of the United States passed in 1820, the Missouri Compromise Act. A plea in abatement to the jurisdiction had been filed setting up that the plaintiff was not a citizen of the United States, and therefore not entitled to bring this action in the Federal Court, but this plea had been overruled in the Circuit Court and the case had gone to trial on its merits. In the Supreme Court the opinion of the court is given by Chief-Justice Taney, and a separate opinion is given by each of the eight associate-justices of whom all but Justices Curtis and McLean decided against the plaintiff, though on such varying grounds that no single proposition has the support of a majority of the court. The opinion of the Chief-Justice, then a man eighty years old, written with grace of style and in a plausibly persuasive manner, first expressly sustains the objection to the jurisdiction on the ground that a negro descended from slaves, whether himself free

or not, is not a citizen of the United States, and then, insisting on the right of the court to go farther and pass upon the merits of the case, holds that property in the slave having existed in Missouri that property right could not be impaired by an act of Congress which undertook to prohibit slavery in the territory, it being beyond the constitutional power of Congress to pass such an act.

Judge Curtis meets the positions of the Chief-Justice point by point. He first settles the rule of practice by which the plea to the jurisdiction, though overruled below, was before the court; establishes on historical grounds and by indisputable facts that free negroes were originally recognized as citizens in some of the states, became general citizens under the confederation, and remained citizens of the United States after the adoption of the constitution; declares his opinion that the court has jurisdiction, and that the plea was bad; points out in a few grave and conclusive words the extra-judicial conduct of the majority of the court in considering at all the merits of the case after having decided that the Circuit Court had no jurisdiction; passes on to discuss the merits, which were necessary to be passed upon in his view of the jurisdiction; analyzes the character of municipal laws respecting slavery and their effect on the status of the slave; examines the provisions of the Missouri Compromise Act, and finds them to involve an absolute prohibition of the state of slavery within the territory in question; examines the laws

of Missouri and finds that neither its statutes nor its decisions undertake to disregard the rule of international law which requires a recognition of a change of status which has actually been accomplished in another jurisdiction; points out that the stay of the plaintiff's master while in the territory was of a character to bring him effectually under the laws there operating; points out that the slave's marriage, while in the territory, with his master's consent materially affected his status; and finally takes up the broad question of the power of Congress over the territory of the United States, which the Chief-Justice had undertaken to curtail to the narrowest limits, reviews the several Acts of Congress passed in exercise of that power, examines the grounds of the right to regulate, and makes an exhaustive argument in support of the constitutionality of the Act of Congress, leaving no aspect of the subject untouched, and concludes with the opinion that the judgment of the court below should be reversed and the plaintiff's freedom established.

There has never been a question of the power shown in this opinion. Since the passions of the time have cooled it has stood as establishing the true principles of constitutional law applicable to that issue, once so vital now happily of no further practical moment.<sup>2</sup> It effectually cleared Judge Curtis,

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<sup>2</sup> The interested reader may wish to compare this statement of Judge Curtis's position with the discussion of Chief-Justice Taney's opinion by Professor Mikell in his essay on Roger B. Taney. *Supra*, vol. IV, p. 74.

even in the eyes of the abolitionists, from the charge which they had made in the early days of their hostility to him, that he was guilty of "legal idolatry of the Constitution." In manner it is a model of lucid exposition and convincing judicial argument, applied to a subject most difficult of exact treatment. In substance it is strong in logical reasoning, in practical grasp, in supporting historical facts, in courageous assertion of principles. It rises to the height of the occasion, and is infused with the air and substance of authority, in the face of its necessarily ineffective character as a minority opinion.

The effect of the decision on the political controversy which was then convulsing the country is a matter of general history; but with the decision went this dissenting opinion, and the more this was studied the less controlling became the actual decision. The main position of the court, that concerning the constitutional power of Congress over the territories, was seen to be an extra-judicial dictum, being on a matter not properly before the court after the plea to the jurisdiction had been expressly sustained, and it stood condemned by Judge Curtis's few, stern sentences:—

On so grave a subject as this I feel obliged to say that in my opinion such an exertion of judicial power transcends the limit of authority of the court. . . . I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri, save that raised by the plea to the jurisdiction.

The opinion supplied the material for effective argument wherever the case was discussed. Mr. Blaine in his "Twenty Years of Congress" says that it "gave a powerful rallying cry to the opponents of slavery," and adds that "perhaps in the whole history of judicial decisions no two opinions were ever so widely read by the mass of the people outside the legal profession." Lincoln is said to have drawn constantly from it in his debates with Douglas; Lincoln's biographers, Nicolay and Hay, observe that the most eminent lawyers and statesmen of that day deemed its arguments conclusive, and other historians agree in their judgment of its merits and its value in the great anti-slavery struggle, so long as that struggle was carried on with arguments.

Shortly after the decision of this case Judge Curtis resigned from the bench. He had become entangled in a painful dispute with the Chief-Justice about the publication of the opinions in that case, a dispute in which Judge Curtis's position is fully justified by the convincing and dignified letters which make his part of the correspondence. In resigning he made no especial concealment of the fact that his confidence in the court as a tribunal for the trial of constitutional questions was weakened by the manner in which the majority had dealt with the case, and that his own satisfaction in acting with the other judges was slight. It was the inadequate salary, however, which was his main reason, and, as stated above, this had previously begun to influence

him, and very likely would have soon carried him off the bench in any event.

That his fellow-dissenter in the *Dred Scott* case felt as keenly as Judge Curtis the impairment of reputation which the court had suffered, appears from the letter which Judge McLean wrote to him on his retirement, in which he says that the court once commanded the respect and veneration of the country, "but it can never hope to regain so elevated a position in the future." Judge Nelson so far agreed with him on the insufficiency of the salary that he writes "If I was not in this place, with my knowledge and experience of its responsibilities and sacrifices I should never hold the office."

Judge Curtis returned to the bar at the age of forty-eight with as great distinction in his profession, and as great opportunities for unlimited practice of the highest grade, as man ever had in this country, and for a second period of seventeen years maintained his place. The object to attain which had been one of the chief reasons for his return, an increase of income, was easily accomplished. His brother estimates his total earnings for this period at about \$650,000, an average of about \$38,000 a year at a time when the usual size of fees was decidedly less than at present, and the purchasing power of money considerably greater; and this amount was earned not in big sums taken in organizing or directing great business enterprises but in miscellaneous practice. He argued during this time forty-six

cases before the United States Supreme Court and eighty before the Massachusetts Supreme Court, and the written professional opinions formally given were very numerous and of a kind which shows his acknowledged eminence as an authority in law, not only in his own state but throughout the country. All the rewards attending such conspicuous success and appropriate to a great leader at the bar, were his. He retained throughout that peculiar place, combining the power of a vigorous advocate, something of the authority of the judge, and the influence of the man of weight in public affairs, which belongs to a certain high type of lawyer for which our system of practice and the habits of our people provide room.

In the thickening clouds which gathered over the country he remained the consistent conservative that he had been from the beginning. Whatever could be done by grave remonstrance to hold his fellow citizens within the enclosure of established law, it was his function to do, and his fellow conservatives found in him their appropriate spokesman on occasions when deliberate solemn utterances were resorted to in a vain attempt to avert the impending conflict. A hopeless appeal, made as late as 1860, to the people of Massachusetts to repeal a state law which had been passed to obstruct the Fugitive Slave Law, and a speech made in Faneuil Hall while secession was in progress urging amendments to the Constitution in the hope of preventing war,



show how unshaken was his position, and firm his principles, little as they could then avail. In 1862 he published a pamphlet on the Executive Power criticizing the constitutionality of the President's acts in issuing the Emancipation Proclamation and suspending the writ of *habeas-corpus*. It is a closely-reasoned argument which has not lost its importance, for the question of the limits of the executive power is not likely at present to become merely academic. He published this with reluctance, impelled by a sincere sense of duty, declaring that he had no attachment to any political party, but was fearful lest in the midst of more external dangers "the danger of the loss of ideas" should pass unmet and unobserved.

With the close of the war, the death of President Lincoln and the accession of President Johnson, the country entered upon the Reconstruction Period. Never was a great state question, instant and vitally practical, so involved in legal and almost metaphysical theories as this of reconstruction, entangled as it was in the interpretation of a written constitution. To find, within the constitution, a consistent method of resuming relations with states which had declared that they were out of the Union, and had been dealt with accordingly as external enemies, and yet, on the theory upon which the North had carried on the war, had never left the Union, this would have been sufficiently puzzling in any case to an expounder of the great instrument within whose sanction every-

thing must always appear to be done. When to these more abstract difficulties there was added the demand made by most of the people of the North that there should be imposed upon the Southern states an unwilling acceptance of a new political status for the negroes, the complication became almost inextricable. In such a discussion Judge Curtis was on familiar ground. As was to be expected, he was on the side of the logical position which had no room for collateral conditions to be imposed by legislative action, but left to the executive the formal recognition of the fact that the war was over, and the provision of machinery by which the states should be allowed, in the simplest way, to resume all the incidents appropriate to the place which they had never left. When the breach between the President and Congress widened, and finally led to the passing of the Tenure of Office Act, and this was followed by the President's refusal to recognize that Act and his impeachment, it was natural for the President to apply first to Judge Curtis to act as one of his counsel. Judge Curtis accepted, though with that reluctance and sense of sacrifice which he seems to have felt whenever called upon to interrupt his practice.

The impeachment trial, while it was solemn as an arraignment by the people of their Chief Magistrate, impressive in the simplicity of its official ceremony, and important in its possible consequences, was so saturated with political heat and passion, so lacking both in any previous stirring events to which

it should be the climax and in any present definite issue commensurate with the occasion, that it evidently presented, even at the time, something of the appearance of a forced affair.

It was the business of the prosecutors to protest always that they were attacking the great destroyer of American liberty; it was the business of the defense to belittle the whole business as worked up by mere party fury. As the main charges upon which the trial was destined to turn were based upon the President's dismissal of Secretary Stanton, contrary, as was alleged, to the Tenure of Office Act, the fundamental question was one of dry technicality. With Judge Curtis were associated as the President's counsel, Messrs. Evarts, Stanbery (who resigned the office of Attorney-General to accept this place), Groesbeck of Ohio and Nelson of Tennessee. The managers of the impeachment took the position that the proceeding was not a legal trial for definite high crimes and misdemeanors, to be conducted with the strictness of a criminal action, but was rather an inquest into the President's official conduct, political in its character and allowing corresponding looseness not only in procedure but in determining the grounds of final judgment. It was necessary for the defense to combat that position at the outset. If the case could be once put upon the basis of a legal trial the defense could discuss with confidence the legality of the president's action, and, whatever its legality, insist upon the absence of criminal in-

tent. In order to set the case upon this solid ground, and to meet by contrast the violence of B. F. Butler who had opened for the managers, the opening argument for the defense was assigned to Judge Curtis. He was perfectly adapted to accomplish this purpose. Identified in the public mind with the Supreme Court of the United States, reinforced in this by the calm gravity of his manner, the judicial tone of his speech, and his total aloofness from political disturbance, he addressed the Senate as a court of justice, impartial, and to be influenced only by reasoned argument. He planted the defense once for all on the positions that the Tenure of Office Act did not, in its terms, cover Secretary Stanton, who had been appointed by President Lincoln and had held over under his successor; that the character of the office of a member of the cabinet, and the debate in Congress when the act was passed, showed that the act was not intended to apply to such a situation as this; that whatever the act meant, an intention on the part of the president to act contrary to it must be proved, and there was no evidence of this; that in view of the previous legislation of Congress, and the long-continued interpretation actually put on the Constitution, it was at least doubtful whether Congress had any constitutional power to restrict the president's right of removal; that it was not only proper for the president to question the validity of the act and its application to Secretary Stanton, but was his duty to resist it so

far as to bring the question of its constitutionality before the court, which was in fact his purpose in what he had done. The articles of impeachment which charged an unlawful conspiracy against the government, were disposed of more briefly by an analysis of the allegations contained in them, and the article based on the speeches derogatory to congress made by the president was met by the argument that no impeachable crime was alleged, a discussion of the scope of impeachment as a strictly legal proceeding, and an exposure of this charge as an attempt to restrict freedom of speech in a manner unknown to the law.

The argument was not only unanswerable in its specific positions but had the desired effect of putting the case upon a plane where legal arguments had to be reckoned with. That position once occupied it was for the defense to keep the case steadily on that ground; and this the counsel who closed the case effectively did.

Judge Curtis's argument is necessarily close and technical, but it is saved from dryness by the clearness of the statement and the obvious progress of the thought. He was not expected to enliven the subject, or ridicule the exaggerated rhetoric of the prosecution, nor did he need, at that stage of the case, to awaken jaded attention in his hearers. All this was left for the brilliant Evarts whose wit, illustration and satirical retort would have been impossible to Curtis. The argument of Mr. Groesbeck is

said to have had an effect perhaps more striking in its immediate impression than any other, though much of this was apparently due to the moving appeal made by the speaker, just risen from a sick bed, and to the dramatic incidents of the moment. Curtis's argument was admitted by all to have had a powerful effect, and as the case was to be won by influencing that small number of independent senators who were uncommitted and still able and willing to exercise an unbiased judgment, it may well be that an argument such as his was of decisive influence. It was addressed, however, to such special points of interpretation, and the facts are now so far forgotten, that it is not to be expected that it shall be hereafter read as a great production having abiding human interest. The impeachment trial had not the elements of a really great contest, and its dramatic value fades in the picture of history.

Within a few days after the close of the trial, the President offered Judge Curtis the position of Attorney-General, which he declined, saying "there is no public office which I shall ever be induced willingly to accept," and adding that even if this resolve were not fixed, his duties to his clients and the condition and affairs of his family would preclude him from accepting.

Five years of unremitting professional labor on matters of the highest importance followed. He was selected by the government as one of its counsel in the Geneva Arbitration but declined the appoint-

ment. In the winter of 1872-1873, he delivered before the Harvard Law School a course of lectures on the Jurisdiction and Practice of the Federal Courts, which have since been published. He died on September 15th, 1874.

Of the private life of Judge Curtis there is little which can appropriately be said in this sketch. His intense devotion to his profession, and the mental absorption which accompanied it, must have necessarily excluded much attention to other matters. He was from early life definitely religious and found theology a congenial study. He was associated with the Unitarian Church until about 1860 when he joined the Episcopal Church, declaring that thought and inquiry had led him to adopt its doctrines. Something of the depths of a reserved nature were revealed by the remark which he made to an intimate friend, who has repeated it to the writer, to the effect that he had never taken his seat on the bench or risen to charge a jury without first offering a silent prayer for wisdom and guidance.

He was three times married and had twelve children, of whom six survived him.

ABRAHAM LINCOLN.





# ABRAHAM LINCOLN.

1809-1865.

BY

WILLIAM ELEROY CURTIS,

*of Washington, D. C.*

**A**BRAMHAM LINCOLN inherited his love of learning from his mother, who was superior in intelligence and refinement to the women of her class and time. His ambition to become a lawyer was inspired by a copy of the Revised Statutes of Indiana which accidentally fell into his hands when he was a mere boy in the swampy forests of the southern section of that state. In a brief autobiography, which he prepared for the newspapers in order to gratify public curiosity when he was nominated as a candidate for president, he says that he "went to school by littles; in all, it did not amount to more than a year," and he afterwards told a friend that he "read through every book he ever heard of in that country for a circuit of fifty miles." These included Weems's "Life of Washington," Bunyan's "Pilgrim's Progress," Æsop's "Fables," "Robinson Crusoe," a History of the United States whose author is not named, the Bible, and the Statutes of Indiana.

This is the catalogue he gave of the books he knew in his youth. His biographer included Plutarch's "Lives," and when the advance sheets of the campaign sketch reached Lincoln he gave a curious exhibition of his habitual accuracy by calling attention to the fact that this was not exact when it was written, "for, up to that moment in my life, I had never seen that early contribution to human history; but I want your book, even if it is nothing more than a mere campaign sketch, to be faithful to the facts, and, in order that the statement might be literally true, I secured the book (Plutarch's 'Lives') a few weeks ago and have sent for you to tell you that I have just read it through."

It is quite remarkable that a country lad, almost illiterate, should have found a volume of statutes interesting reading, but Lincoln read and reread it until he had almost committed its contents to memory, and in after-years, when any one cited an Indiana law, he could usually repeat the exact text and often give the numbers of the page, chapter and paragraph. The book belonged to David Turnham, who seems to have been a constable or magistrate in that part of Indiana, and this volume constituted his professional library. The actual copy is now preserved in the library of the New York Law Institute. The binding is worn and the title-page and a few leaves at the end are missing. Besides the statutes as enacted up to 1824, it contains the Declaration of Independence, the Constitutions of the United

States and the State of Indiana, and the Act of Virginia, passed in 1783, by which "The territory North Westward of the river Ohio" was conveyed to the United States, and the ordinance of 1787 for governing that territory, of which Article VI reads:

"There shall neither be slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crime, whereof the party shall be duly convicted; provided always, that any person escaping into the same, from whom labor or service is lawfully claimed, in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid."

It is an interesting coincidence that Abraham Lincoln should not only have received the impressions which guided him in the choice of his career from this volume, but also his first knowledge of the legal side of slavery. Before he finished that book he knew the principles upon which the government of the United States was founded and how they were applied in the states. Its contents were fastened upon his memory by copying long extracts with a quill of a turkey-buzzard and ink home-made from the juice of the brier root. When he had no paper he wrote upon a shingle, and, after he had committed to memory the paragraphs so preserved, he would shave off the shingle with his knife and write others. When he was in the field ploughing or cultivating he took a book with him, and when he

stopped to rest would pull it from his pocket and read until it was time to resume work again. In after-life, even when he came to the White House, he used to speak of the impressions made upon his mind by the "Life of Washington," and always contended that it was better for the young men of the country to regard Washington in the light of a demigod, as Parson Weems describes him, than to shake their faith in the greatest hero of American history by narrating his mistakes and follies as if he were a common man.

He never lost his love for Bunyan's "Pilgrim's Progress" or Defoe's "Robinson Crusoe." The characters in both of these works were real to him, and to the end of his days he could repeat Æsop's "Fables" verbatim.

In those days schools were very scarce and poor; the teachers were usually incompetent itinerant adventurers or men too lazy or feeble to do the manual labor required of frontiersmen. They were paid a trifling fee for each scholar and "boarded 'round." Nothing was expected of them in the way of education beyond a knowledge of the three R's, and Lincoln, of all famous self-made men, owed the least of his intellectual strength and knowledge to teachers and books and the most to observation and human contact. When he was upon his eventful "speaking trip," as he called it, in New England, in the spring of 1860, a clergyman of Hartford was so impressed by the language and logic of his address

that he inquired where he was educated. Mr. Lincoln replied,—

“Well, as to education, the newspapers are correct. I never went to school more than six months in my life. I can say this: that among my earliest recollections I remember how, when a mere child, I used to get irritated when anybody talked to me in a way that I could not understand. I can remember going to my little bed-room, after hearing the neighbors talk of an evening with my father, and spending no small part of the night trying to make out what was the exact meaning of some of their, to me, dark sayings.

“I could not sleep, although I tried to, when I got on such a hunt for an idea until I had caught it; and when I thought I had got it I was not satisfied until I had repeated it over and over again, until I had put it in language plain enough, as I thought, for any boy I knew to comprehend. This was a kind of passion with me, and it has stuck by me; for I am never easy now, when I am handling a thought, until I have bounded it north and bounded it south and bounded it east and bounded it west.”

Among the papers of the late Charles Lanman there is a sketch of Mr. Lincoln, written in his own hand. Mr. Lanman was editor of the *Congressional Directory* at the time that Mr. Lincoln was elected to Congress, and, according to the ordinary custom, forwarded to him, as well as to all the other members-elect, a blank to be filled out with facts and

dates which might be made the basis for a biographical sketch in the *Directory*. Lincoln's blank was returned promptly filled up in his own handwriting, with the following information:

"Born February 12, 1809, in Hardin County, Kentucky.

"Education defective.

"Profession, lawyer.

"Military service, captain of volunteers in the Black Hawk War.

"Offices held: postmaster at a very small office; four times a member of the Illinois Legislature, and elected to the Lower House of the next Congress."

Mr. Leonard Swett, who was closely identified with Mr. Lincoln for many years, says,—

"In the fall of 1853, as I was riding with Mr. Lincoln, I said, 'I have heard a great many curious incidents of your early life, and I would be obliged if you would begin at your earliest recollection and tell me the story of it continuously.'

"'I can remember,' he said, 'our life in Kentucky: the cabin, the stinted living, the sale of our possessions, and the journey with my father and mother to Southern Indiana.' I think he said he was then about six years old. Shortly after his arrival in Indiana his mother died. 'It was pretty pinching times at first in Indiana, getting the cabin built, and the clearing for the crops; but presently we got reasonably comfortable, and my father married again.'

"He had very faint recollections of his own

mother, he was so young when she died; but he spoke most kindly of her and of his step-mother, and her cares for him in providing for his wants.

“‘My father,’ he said, ‘had suffered greatly for the want of an education, and he determined at an early day that I should be well educated. And what do you think his ideas of a good education were? We had a dog-eared arithmetic in our house, and father determined that somehow, or somehow else, I should cipher clear through that book.’

“With this standard of an education, he started to a school in a log-house in the neighborhood, and began his educational career. He had attended this school but about six weeks, however, when a calamity befell his father. He had indorsed a man’s note in the neighborhood for a considerable amount, and the prospect was he would have it to pay, and that would sweep away all their little possessions. His father, therefore, explained to him that he wanted to hire him out and receive the fruits of his labor and his aid in averting this calamity. Accordingly, at the expiration of six weeks, he left school and never returned to it again.”

He first attended school when he was about seven years old and still living in Kentucky. It was held in a little log-hut near their cabin, and was taught by Zachariah Riney, an Irish Catholic of whom he retained a pleasant memory, for it was there that he learned to read. The next year Caleb Hazel opened a school about four miles distant, which Lin-



coln attended for three months with his sister Sarah, and both of them learned to write. He had no more teaching while he lived in Kentucky, except from his mother. There is no record of his schooling in Indiana, but the neighbors testify that in his tenth year he attended school for a few months in a small cabin of round logs about a mile and a half from the rude home of his father; there he went again for a few months when he was fourteen years old, and again in 1826, when he was seventeen, to a man named Swaney, who taught at a distance of four miles and a half from the Lincoln cabin. He had little encouragement from his father, for the latter considered the daily walk of nine miles and the six hours spent in the school-room a waste of time for a boy six feet tall. His step-mother, however, endeavored to encourage and protect him in his efforts to learn, and they studied together. He read her the books he borrowed, and they used to discuss the unintelligible passages. He was not remarkably quick at learning. On the contrary, his perceptions were rather dull; but that is often an advantage to a studious mind, as everything increases in value with the effort required to attain it. His memory was good, his power of reasoning was early developed, and a habit of reflection was acquired at an early age. He once remarked to a friend that his mind did not take impressions easily, but they were never effaced. "I am slow to learn, and slow to forget that which I have learned," he said. "My

mind is like a piece of steel—very hard to scratch anything on it, and almost impossible after you get it there to rub it out.” The fact that he never abandoned an idea until it was thoroughly understood was the foundation of a healthy mental growth.

At this time, when he was seventeen years old, he had a general knowledge of the rudiments of learning. He was a good arithmetician, he had some knowledge of geography and history, he could “spell down” the whole county at spelling-school, and wrote a clear and neat hand. His general reading embraced poetry and a few novels. He even attempted to make rhymes, although he was not very successful. He wrote several prose compositions, and it is related that “one of the most popular amusements in the neighborhood was to hear Abe Lincoln make a comic speech.”

Lincoln received no more teaching, but continued his reading and study until his family removed to Illinois. When he went to New Salem, after he had made his second voyage to New Orleans, and was waiting for Denton Offutt to open his store, a local election was held. One of the clerks of election being unable to attend, Menton Graham, the other clerk, who was also the village school-master, asked Lincoln if he could write.

“I can make a few rabbit tracks,” was the reply, and upon that admission he was sworn into his first office.

Thus began one of the most useful friendships he

ever enjoyed, for Graham was an intelligent and sympathetic friend who inspired the future President with ambition, nourished his appetite for knowledge, loaned him books, assisted him in his studies, heard him recite, corrected his compositions, and was his constant companion while he was clerking in Offutt's store. One day Graham told him that he ought to study grammar, and the next morning Lincoln walked six miles to a neighboring town to obtain a copy of Kirkham's "Grammar." This volume was found in his library after his death. It was Graham, too, who in six weeks taught him the science of surveying after Lincoln was appointed deputy to John Calhoun. From none of his many friends did he receive more valuable counsel and assistance.

After he was admitted to the bar and became a member of the Legislature, he continued a regular course of study, including mathematics, logic, rhetoric, astronomy, literature, and other branches, devoting a certain number of hours to it every day. He followed this rule even after his marriage, and several years after his return from Congress he joined a German class which met in his office two evenings a week.

His early friends have always contended that his devotion to study hastened the failure of the mercantile enterprise which caused him so much anxiety and left the burden of debt upon his shoulders which he carried so many years; for when he should

have been attending to the store and watching the dissolute habits of his partner, he was absorbed in his books.

His ambition to be a lawyer was stimulated by a curious incident that occurred soon after he went into partnership with Berry. He related it himself in these words:

“One day a man who was migrating to the west drove up in front of my store with a wagon which contained his family and household plunder. He asked me if I would buy an old barrel for which he had no room in his wagon, and which he said contained nothing of special value. I did not want it, but to oblige him I bought it, and paid him, I think, half a dollar for it. Without further examination I put it away in the store and forgot all about it. Some time after, in overhauling things, I came upon the barrel, and emptying it upon the floor to see what it contained, I found at the bottom of the rubbish a complete edition of Blackstone’s ‘Commentaries.’ I began to read those famous works, and I had plenty of time; for during the long summer days, when the farmers were busy with their crops, my customers were few and far between. The more I read”—this he said with unusual emphasis—“the more intensely interested I became. Never in my whole life was my mind so thoroughly absorbed. I read until I devoured them.”

It was while he was still a deputy surveyor that Lincoln was elected to the Legislature, and in his

autobiographical notes he says, "During the canvass, in a private conversation, Major John T. Stuart (one of his fellow-candidates) encouraged Abraham to study law. After the election he borrowed books of Stuart, took them home with him and went at it in good earnest. He never studied with anybody. As he tramped back and forth from Springfield, twenty miles away, to get his law books, he read sometimes forty pages or more on the way. The subject seemed to be never out of his mind. It was the great absorbing interest of his life." The rule he gave twenty years later to a young man who wanted to know how to become a lawyer, was the one he practised: "Get books and read and study them carefully. Begin with Blackstone's 'Commentaries,' say twice, take Chitty's 'Pleadings,' Greenleaf's 'Evidence,' and Story's 'Equity,' in succession. Work, work, work is the main thing."

Immediately after his election he went to Springfield and was admitted to the bar on September 9th, 1836. His name first appears upon the list of the attorneys and counsellors-at-law published at the opening of the next term, March 1st, 1837. As there was no lawyer in the neighborhood of New Salem, and none nearer than Springfield, Lincoln had obtained a little practice in petty cases before the village magistrate, and it is stated that, poor as he was, he never accepted a fee for such services because he felt that he was fully paid by the experience.

For a long time he was in doubt as to the expe-

diency of abandoning his work as surveyor, which brought him from twelve to fifteen dollars a month, for the uncertain income of a lawyer, for he was still burdened by debt, and was constantly called upon for money by his step-mother and step-brother; but John T. Stuart, with whom he had been associated in politics and in the Black Hawk War, and who had proved to be a true friend, offered him a partnership, and Stuart was one of the leading lawyers of the state. Therefore, Lincoln decided to take the chances, and, on April 15th, 1837, rode into Springfield, says his friend Joshua Speed, "on a borrowed horse, with no earthly property save a pair of saddle-bags containing a few clothes."

His first case was that of *Hawthorne vs. Woolridge*, his first fee was three dollars, and he made his first appearance in court in October, 1836. We do not know the details. He created a sensation the following summer, and for the first time revealed some of the characteristics which afterwards made him famous by his merciless pursuit of a rascal named Adams who had swindled the widow of one Joseph Anderson out of some land. His treatment of this case advertised him far and wide in the country around Springfield as a shrewd practitioner and a man of tireless energy, and it doubtless brought him considerable business. The account-book of Stuart & Lincoln is still preserved, and shows that their fees were very small,—not exceeding sixteen hundred dollars for the year and seldom more than ten dol-

lars in a case; while many of them were traded out at the town groceries, and, in the case of farmers, were paid in vegetables, poultry, butter, and other produce. But that was the custom of the time, and at that date a fee of one hundred dollars was as rare as one of ten thousand dollars now.

In those days, because of the scattering population and the absence of transportation facilities, it was customary for courts to travel in circuits, each circuit being presided over by a judge who went from one county-seat to another twice a year to hear whatever cases had accumulated upon the docket. Springfield was situated in the Eighth Judicial Circuit, which at that time was one hundred and fifty miles square, including fifteen counties comprising the central part of Illinois. As there were no railroads, the judge traveled on horseback or in a carriage, followed by a number of lawyers. The best-known lawyers had central offices at Springfield and branch offices at the different county-seats, where they were represented permanently by junior partners, who prepared their cases and attended to litigation of minor importance.

When the county-seat was reached the judge was given the best room at the hotel and presided at the dining-room table, surrounded by lawyers, jurors, witnesses, litigants, prisoners out on bail, and even the men who drove their teams. The hotels were primitive and limited, and, as the sitting of a court usually attracted all the idle men in the vicinity, the

landlords were taxed to accommodate their guests, and packed them in as closely as possible; usually two in a bed and often as many as could find room on the floor. The townspeople made the semi-annual meeting of the court an occasion for social festivities, the judge being the guest of honor at dinners, receptions, quiltings, huskings, weddings, and other entertainments, while the lawyers ranked according to their social standing and accomplishments.

In some of the towns there was no court-house, and trials were held in a church or a school-house, and sometimes, when the weather was favorable, in the open air.

When there was no entertainment of an evening, the members of the bar and their clients who were not preparing for a trial on the morrow amused themselves by playing cards, telling stories, and discussing public affairs, so that all who "followed the circuit" became thoroughly acquainted and each was estimated according to his true value. Trials of general interest were attended by the entire cavalcade, but dull arguments and routine business attracted the attention of those only who were personally concerned. In the mean time the rest of the party would sit around the tavern or court-house yard, entertaining themselves and one another in the most agreeable manner, and naturally Mr. Lincoln's talents as a story-teller made him popular and his personal character made him beloved by every one with whom he came in contact. The meeting of the Su-



preme Court once a year at Springfield was the great event, next to the assembling of the Legislature, and served as a reunion of the ablest men in the State. These usually had causes to try or motions to submit, or if they had none would make some excuse for attending the gathering. The Supreme Court Library was their rendezvous, and Lincoln was the center of attraction, even when he was a young man; when he became older his presence was regarded as necessary to a successful evening. His stories were as much a part of these annual gatherings as the decisions of the court, and after this custom became obsolete the older lawyers retained with an affectionate interest the memories of their association with him.

David Davis, afterwards Justice of the United States Supreme Court and a member of the United States senate from Illinois, presided over the Eighth Circuit for many years while Lincoln was in practice, and was one of his most ardent admirers and devoted friends. It is said that he would not sit down at the table for dinner or supper until Lincoln was present. One day, during the trial of a cause, when Lincoln was the center of a group in a distant corner of the court-room, exchanging whispered stories, Judge Davis rapped on the bench and, calling him by name, exclaimed,—

“Mr. Lincoln, this must stop! There is no use in trying to carry on two courts; one of them will have to adjourn, and I think yours will have to be the one;” and as soon as the group scattered, Judge

Davis called one of the group to the bench and asked him to repeat the stories Lincoln had been telling.

Books of reminiscences written by the men who lived in Illinois in those days are filled with anecdotes of him, and, even now, it is common in arguments before the courts in that part of the state to quote what Lincoln said or did under similar circumstances, and his opinions have the force of judicial decisions.

In his autobiography, Joseph Jefferson tells an interesting story of the experience of his father's theatrical company when it was traveling through Illinois in 1839. He was then a child of ten years. After playing at Chicago, Quincy, Peoria and Pekin, the company went to Springfield, where the presence of the Legislature tempted the elder Jefferson and his company to remain throughout the season. There was no theater, so they built one; it was scarcely completed before a religious revival turned the influence of the church people against their performances so effectually that a law was passed by the municipality imposing a license which was practically prohibitory. In the midst of their troubles, says Jefferson, a young lawyer called on the managers and offered, if they would place the matter in his hands, to have the license revoked, declaring that he only desired to see fair play, and would accept no fee whether he failed or succeeded. The young lawyer handled the case with tact, skill, and humor, in his argument tracing the history of the drama

from the time when Thespis acted in a cart to the stage of to-day. He illustrated his speech with pointed anecdotes which kept the City Council in a roar of laughter. "This good-humor prevailed," relates the famous actor, "and the exhibition tax was taken off." The young lawyer was Lincoln.

Many of the reminiscences relate to Lincoln's skill at cross-examination, in which, it is asserted, he had no equal at the Illinois bar. Judge Davis declared that he had the rare gift of compelling a witness, either friendly or unfriendly, to tell the whole truth, and seldom resorted to the browbeating tactics so often used by attorneys. He never irritated a witness, but treated him so kindly and courteously as to disarm him of any hostile intention.

He never used a word which the dullest juryman could not understand. A lawyer quoting a legal maxim one day in court, turned to Lincoln and said, "That is so, is it not, Mr. Lincoln?"

"If that's Latin," Lincoln replied, "you had better call another witness."

Mr. T. W. S. Kidd says that he once heard a lawyer opposed to Lincoln trying to convince a jury that precedent was superior to law, and that custom made things legal in all cases. When Lincoln rose to answer, he told the jury he would argue his case in the same way. Said he, "Old Squire Bagly, from Menard, came into my office and said, 'Lincoln, I want your advice as a lawyer. Has a man what's been elected justice of the peace a right to issue a

marriage license?' I told him he had not; when the old squire threw himself back in his chair very indignantly, and said, 'Lincoln, I thought you was a lawyer. Now, Bob Thomas and me had a bet on this thing, and we agreed to let you decide; but if this is your opinion I don't want it, for I know a thunderin' sight better, for I have been squire now eight years and have done it all the time.' "

Lincoln always felt and frequently expressed a deep sense of gratitude to Judge Stephen T. Logan, his second partner, with whom he became associated in 1841. Judge Logan was the recognized head of his profession in the central part of the state, a man of high ideals, noble character, and excellent professional habits. Such example and instruction were of the greatest service in forming Lincoln's professional habits, because he was naturally careless in his methods, and at that period of his life was inclined to depend upon his wits rather than his knowledge and to indulge in emotional bursts of oratory rather than simple, convincing logic. He attributed his superior faculty in presenting a case to Judge Logan's instructions. Nor was he the only man who owed much of his success in life to this great preceptor. Four of Judge Logan's law students found their way to the United States senate and three were governors of states.

When Lincoln's experience in congress had extended his reputation, broadened his ideas, and given him a better knowledge of men and things, his prac-

tical value as a partner was recognized by the members of one of the most prominent law firms in Chicago, who invited him to join them; but he declined on the ground that his family ties as well as his professional connections were in Springfield, and he feared that his health would not endure the close confinement of a city office.

Among Lincoln's manuscripts after his death were found a few pages of notes evidently intended or perhaps, used at some time for a lecture to law students, and which express in a very clear manner his opinions as to the ethics of practice. His words should be printed upon card-board and hung in every law office in the land.

“ . . . Extemporaneous speaking should be practised and cultivated. It is the lawyer's avenue to the public. However able and faithful he may be in other respects, people are slow to bring him business if he cannot make a speech. And yet, there is not a more fatal error to young lawyers than relying too much on speech-making. If any one, upon his rare powers of speaking, shall claim an exemption from the drudgery of the law, his case is a failure in advance. Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough. Never stir up litigation. A worse man

can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it. . . . There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because, when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common,—almost universal. Let no young man choosing the law for a calling, for a moment yield to the popular belief. Resolve to be honest at all events; and if, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation rather than one in the choosing of which you do, in advance, consent to be a knave.”

Lincoln and McClellan first met three or four years before the war, when the latter was Vice-President and Chief Engineer of the Illinois Central Railroad and the former was attorney for that company. General McClellan, in his autobiography, gives an account of his relations with Lincoln at that time, but they were never intimate.

In 1859, when Lincoln appeared for the Illinois Central Railroad in a case which it did not wish to try at that term, he remarked to the court,—

"We are not ready for trial."

"Why is not the company ready to go to trial?" remarked Judge Davis.

"We are embarrassed by the absence of Captain McClellan," was Lincoln's reply.

"Who is Captain McClellan and why is he not here?" asked Judge Davis.

"All I know," said Mr. Lincoln, "is that he is the engineer of the railroad, and why he is not here deponent saith not."

It has been frequently said that General McClellan refused to pay Lincoln a fee charged for trying a case for the Illinois Central Railroad, but it is not true. At the time referred to (1855) Captain McClellan was in the regular army and a military attaché in Europe during the Crimean War. It was, however, the only time that Lincoln sued for a fee, and the circumstances were as follows. By its charter the Illinois Central Railroad was exempt from taxation on condition that it pay into the State treasury seven per cent of its gross earnings. The officials of McLean County contended that the legislature of the state had no authority to exempt or remit county taxes, and brought a suit against the road to compel payment. Lincoln defended the company, won the case, and presented a bill for two thousand dollars. An official of the railroad, whose name has been forgotten, declined payment on the ground that it was as much as a first-class lawyer would charge. Lincoln was so indignant that he withdrew the orig-

inal bill of charges, consulted professional friends, and later submitted another for five thousand dollars with a memorandum attached, signed by six of the most prominent lawyers in the state, giving as their opinion that the fee was not unreasonable. As the company still refused to pay, Lincoln sued and recovered the full amount.

Lincoln's theory regarding fees for professional services is expressed in the notes of the law lecture previously referred to, and was as follows:

"The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client. An exorbitant fee should never be claimed. As a general rule, never take your whole fee in advance, nor any more than a small retainer. When fully paid beforehand, you are more than a common mortal if you can feel the same interest in the case as if something was still in prospect for you as well as for your client. And when you lack interest in the case the job will very likely lack skill and diligence in the performance. Settle the amount of fee and take a note in advance. Then you will feel that you are working for something, and you are sure to do your work faithfully and well. Never sell a fee note,—at least not before the consideration service is performed. It leads to negligence and dishonesty,—negligence by losing interest in the case, and dishonesty in refusing to refund when you have allowed the consideration to fail."



If a client was poor he charged him accordingly, and if he was unable to pay asked nothing for his services. It was one of his theories that a lawyer, like a minister of the Gospel or a physician, was in duty bound to render service whenever called upon, regardless of the prospects of compensation, and in several cases he offered his services without compensation to people who had suffered injustice and were unable to pay. As a rule, his fees were less than those of other lawyers of his circuit. Justice Davis once remonstrated with him, and insisted that he was doing a grave injustice to his associates at the bar by charging so little for his services. From 1850 to 1860 his income varied from two to three thousand dollars, and even when he was recognized as one of the ablest lawyers of the State his fee-book frequently shows charges of three dollars, five dollars, and one dollar for advice, although he never went into court for less than ten dollars. During that period he was at the height of his power and popularity, and lawyers of less standing and talent charged several times those amounts. But avarice was the least of his faults.

While he was president a certain senator was charged with an attempt to swindle the government out of some millions. Discussing the scandal one day with some friends, he remarked that he could not understand why men should be so eager after wealth. "Wealth," said he, "is simply a superfluity of what we don't need."

An examination of the dockets of the Illinois Supreme Court shows that during a period of twenty years, beginning with 1840 and ending with his election to the presidency, he had nearly one hundred cases before that court, which is an unusual record and has been surpassed by few lawyers in the history of the state and by none of his contemporaries. It was declared, in an oration delivered by one of his associates, that "In his career as a lawyer he traversed a wide range of territory, attended many courts and had a variety of cases, and in all his conflicts at the bar he was successful in every case where he ought to have been."

When he went to Washington to become president his debts were entirely paid and he was worth about ten thousand dollars in real estate and other property.

A singular story is told of a case in which a good many prominent men were involved besides Lincoln. Abraham Brokaw, of Bloomington, loaned five hundred dollars to one of his neighbors and took a note, which remained unpaid. Action was brought, the sheriff levied on the property of the debtor and collected the entire amount, but neglected to turn over the proceeds. Brokaw employed Stephen A. Douglas, who collected the amount from the bondsman of the sheriff, but returned to his seat in the senate at Washington without making a settlement. Like some other great men, Douglas was very careless about money matters, and, after appeal-

ing to him again and again, Brokaw employed David Davis to bring suit against the senator. Being an intimate friend and fellow-Democrat, Davis disliked to appear in the case, and by his advice Brokaw engaged the services of Lincoln. The latter wrote to Douglas at Washington that he had a claim against him for collection and must insist upon prompt payment. Douglas became very indignant and reproached Brokaw for placing such a political weapon in the hands of an abolitionist. Brokaw sent Douglas's letter to Lincoln, and the latter employed "Long John" Wentworth, then a Democratic member of Congress from Chicago, as an associate in the case. Wentworth saw Douglas, persuaded him to pay the money, and forwarded five hundred dollars to Lincoln, who, in turn, paid it to Brokaw and sent a bill of three dollars and fifty cents for professional services.

Lincoln's greatest legal triumph was the acquittal of an old neighbor named Duff Armstrong, who was charged with murder, and several witnesses testified that they saw the accused commit the deed one night about eleven o'clock. Lincoln attempted no cross-examination, except to persuade them to reiterate their statements and to explain that they were able to see the act distinctly because of the bright moonlight. By several of the prosecuting witnesses he proved the exact position and size of the moon at the time of the murder. The prosecution there rested, and Lincoln, addressing the court and the

jury, announced that he had no defense to submit except an almanac, which would show that there was no moon on that night. The state's attorney was paralyzed, but the court admitted the almanac as competent testimony, and every witness was completely impeached and convicted of perjury. The verdict was "not guilty."

One of the most important cases in which Lincoln was ever engaged involved the ownership of a patent for the reaping machines manufactured by Cyrus H. McCormick, of Chicago, who sued John Manny, of Rockford, for infringement. McCormick was represented by E. N. Dickerson and Reverdy Johnson. Manny was represented by Edwin M. Stanton, who was afterwards Lincoln's Secretary of War; Peter H. Watson, who was afterwards Assistant Secretary of War; and George Harding, of Philadelphia. The case was tried in Cincinnati, and, to his intense disappointment and chagrin, Lincoln was not allowed to make an argument he had prepared because the court would not permit four arguments on one side and only two on the other. Lincoln was extremely anxious to meet in debate Reverdy Johnson, of Baltimore, who was then regarded by many as the leader of the American bar; but he accepted the situation gracefully though regretfully, watched the case closely as it proceeded, took careful notes which he furnished Mr. Harding, and gave the latter the benefit of his written argument, but requested him not to show it to Mr. Stan-

ton. There is no doubt that he felt that Mr. Stanton had been guilty of professional discourtesy in refusing to insist that the court hear Lincoln as well as himself, believing that this concession would have been granted if the demand had been pressed, or if Mr. Stanton had proposed that the time allowed for argument be divided. Mr. Stanton was not unaware of Lincoln's wishes, for they were fully explained to him by Mr. Harding, who urged him to give Lincoln an opportunity to speak, but, being the senior counsel in the case, he assigned Mr. George H. Harding, of Philadelphia, who was a patent expert, to submit the technical side of the case, and assumed the entire responsibility of making the legal argument himself.

This incident is particularly interesting in connection with the future relations between the two men, and it is certain that Lincoln was profoundly impressed with Mr. Stanton's ability in the presentation of his case. The matter was never alluded to by either during their long and intimate association at Washington. A young lawyer from Rockford who had studied with Lincoln was in Cincinnati at the time and attended the trial. When the court adjourned after Stanton's argument they walked together to their hotel. Mr. Emerson says that Lincoln seemed dejected, and, turning to him suddenly, exclaimed in an impulsive manner,—

"Emerson, I am going home to study law."

" 'Why,' I exclaimed, 'Mr. Lincoln, you stand at

the head of the bar in Illinois now! What are you talking about?

“‘Ah, yes,’ he said, ‘I do occupy a good position there, and I think I can get along with the way things are done there now. But these college-trained men, who have devoted their whole lives to study, are coming west, don’t you see? And they study their cases as we never do. They have got as far as Cincinnati now. They will soon be in Illinois.’ Another long pause; then stopping and turning toward me, his countenance suddenly assuming that look of strong determination which those who knew him best sometimes saw upon his face, he exclaimed, ‘I am going home to study law! I am as good as any of them, and when they get out to Illinois I will be ready for them.’”

While Mr. Lincoln was not a sensitive man in the ordinary sense of that term, he felt keenly his own deficiencies in education; nor did he lose this feeling when his ability as a statesman was recognized by the entire universe and he held the destiny of a nation in his grasp. Once, when a famous lawyer called at the White House and referred courteously to his eminent position at the bar, he replied, “Oh, I am only a mast-fed lawyer,” referring to his limited education. “Mast” is a kind of food composed of acorns, grass, and similar natural substances which was commonly given to cattle and hogs in Indiana and other frontier states when he was a boy.

Conscious of his deficiencies, he never ceased to be a student. Until the very day of his death he was eager to acquire knowledge, and no new subject was ever presented to him without exciting his inquisitiveness and determination to learn all there was to know about it. Of this characteristic he once remarked to a friend,—

“In the course of my law reading I constantly came upon the word *demonstrate*—I thought at first that I understood its meaning, but soon became satisfied that I did not. I consulted Webster’s Dictionary. That told of certain proof, ‘proof beyond the probability of doubt;’ but I could form no sort of idea what sort of proof that was.

‘I consulted all the dictionaries and books of reference I could find, but with no better results. You might as well have defined blue to a blind man. At last I said, ‘Lincoln, you can never make a lawyer if you do not understand what *demonstrate* means;’ and I left my situation in Springfield, went home to my father’s house, and stayed there until I could give any proposition in the six books of Euclid at sight. I then found out what *demonstrate* meant, and went back to my law studies.”

He met every new question with the same disposition, and nobody ever knew better how to dig for the root of a subject than he. When his children began to go to school, he used to study with them, and frequently referred to the many interesting points of information and the valuable knowledge

he acquired in that way. The lawyers who were associated with him upon the circuit relate how often he was accustomed to pull a book from his pocket whenever he had an idle moment, and it was quite as frequently a treatise on astronomy or engineering or a medical lecture as a collection of poems or speeches.

But, with all his modesty and diffidence, he never hesitated to meet with confidence the most formidable opponent at the bar or on the stump, and frequently, when reading accounts of litigation in which famous lawyers were engaged, he would express a wish that he might some time "tackle" them in a court-room. He once said that in all his practice at the bar he had never been surprised by the strength of the testimony or the arguments of his adversary, and usually found them weaker than he feared. This was due to a habit he acquired early in his practice of studying the opposite side of every disputed question in every law case and every political issue quite as carefully as his own side. When he had an important case on hand he was accustomed to withdraw himself into a room where he would not be disturbed, or, what he liked better, to get out into the fields or the woods around Springfield where there was nothing to distract his thoughts, in order to "argue it out in my own mind," as he put it; and when he returned to his house or his office he would usually have a clear conception of his case and have formed his plan of action.



He argued great causes in which principles were involved with all the zeal and earnestness that a righteous soul could feel. Trifling causes he dismissed with the ridicule in which he was unsurpassed, and his associates relate many incidents when a verdict was rendered in a gale of laughter because of the droll tactics used by Lincoln. He never depended upon technicalities or the tricks of the profession. He never attempted to throw obstacles in the way of justice, or to gain an unfair advantage of his adversaries, but was capable of executing legal manœuvres with as much skill as any of his rivals. He adapted himself to circumstances with remarkable ease, and his thorough knowledge of human nature enabled him to excite the interest and sympathy of a jury by getting very close to their hearts. He argued much from analogy; he used old-fashioned words and homely phrases which were familiar to the jurymen he desired to impress, and illustrated his points by stories, maxims, and figures often droll and sometimes vulgar, because he knew that he could make it plainer to them in that way and that they would better understand the force and bearing of his arguments. He relied more upon this method of convincing a jury than upon exhibitions of learning or flights of eloquence, and his acquaintance with human nature was even more intimate than his knowledge of the law.

Few of his speeches at the bar have been preserved, but his contemporaries have left us many in-

teresting reminiscences of his originality and power. His ungainly form and awkward gesticulations enhanced the force of his arguments and attracted the attention and sympathy of a country jury more than the most graceful manners and elegant rhetoric could have done. It was always his rule, in presenting a case, to cut out all of the "dead wood" and get down to "hard pan," as he called it, as soon as possible. In making such concessions he would establish a position of fairness and honesty, and often disarmed his opponent by leaving the impression that he had accidentally "given away his case." Then he would rely upon his remarkable habit of order and command of logic to bring his evidence forward in a clear and strong light, keeping unnecessary details away from the attention of the jury and pressing only the essential points with which he expected to convince them. Sometimes, when his opponent seemed to have captured a verdict, he would abandon his serious argument and begin to tell stories one after another with more or less application, until by such diversion he had effaced from the minds of the jury every impression that the other side had made.

Justice Lawrence Weldon, of the United States Court of Claims, in his reminiscences says, "One of the most interesting incidents in my early acquaintance with Mr. Lincoln was a lawsuit in which Mr. Lincoln was counsel for the plaintiff and I was counsel for the defendant. Even then, in a trial

that was the sensation of an obscure village on the prairies, Mr. Lincoln showed that supreme sense of justice to God and his fellow-men.

"It was a family quarrel between two brothers-in-law, Jack Dungee and Joe Spencer. Dungee was a Portuguese, extremely dark-complexioned, but not a bad-looking fellow; and after a time he married Spencer's sister, with the approval of Spencer's family. I don't remember the origin of the quarrel, but it became bitter; and the last straw was laid on when Spencer called Dungee a 'nigger' and followed it up, they say, by adding 'a nigger married to a white woman.' The statute of Illinois made it a crime for a negro to marry a white woman, and, because of that, the words were slanderous. Dungee, through Mr. Lincoln, brought the suit for slander. Judge David Davis was on the bench, and the suit was brought in the De Witt County Circuit Court. When the case came up, Mr. Moore and myself appeared for the defense and demurred to the declaration, which, to the annoyance of Mr. Lincoln, the court sustained. Whatever interest Mr. Lincoln took in the case before that time, his professional pride was aroused by the fact that the court had decided that his papers were deficient. Looking across the trial table at Moore and myself and shaking his long, bony finger, he said, 'Now, by jing, I will beat you boys!'

"At the next term of the court Mr. Lincoln appeared with his papers amended, and fully deter-

mined to make good his promise to 'beat the boys!' and we thought his chances pretty good to do it, too. We knew our man was a fool not to have settled it, but still we were bound to defend and clear him if we could.

"In the argument of the case on the testimony Mr. Lincoln made a most powerful and remarkable speech, abounding in wit, logic, and eloquence of the highest order. His thoughts were clothed in the simplest garb of expression and in words understood by every juror in the box. After the instructions were given by the court the jury retired, and in a few moments returned with a judgment for the plaintiff, in a sum which was a large amount for those days.

"Mr. Lincoln's advice to his client was that Dun-gee agree to remit the whole judgment, by Spencer paying the cost of the suit and Mr. Lincoln's fee. Mr. Lincoln then proposed to leave the amount of his fee to Moore and myself. We protested against this, and insisted that Mr. Lincoln should fix the amount of his own fee. After a few moments' thought he said, 'Well, gentlemen, don't you think I have honestly earned twenty-five dollars?' We were astonished, and had he said one hundred dollars it would have been what we expected. The judgment was a large one for those days; he had attended the case at two terms of court, had been engaged for two days in a hotly contested suit, and his client's adversary was going to pay the bill. The

simplicity of Mr. Lincoln's character in money matters is well illustrated by the fact that for all this he charged twenty-five dollars!"

Justice David Davis, of the Supreme Court of the United States, said, "In all the elements that constitute the great lawyer he had few equals. He was great both at *nisi prius* and before an appellate tribunal. He seized the strong points of a cause and presented them with clearness and great compactness. His mind was logical and direct, and did not indulge in extraneous discussion. Generalities and platitudes had no charms for him. An unfailing vein of humor never deserted him; and he was able to claim the attention of court and jury, when the cause was the most uninteresting, by the appropriateness of his anecdotes. His power of comparison was large, and he rarely failed in a legal discussion to use that mode of reasoning. The framework of his mental and moral being was honesty, and a wrong cause was poorly defended by him. He hated wrong and oppression everywhere, and many a man whose fraudulent conduct was undergoing review in a court of justice has writhed under his terrific indignation and rebukes. The people where he practised law were not rich, and his charges were always small. When he was elected president, I question whether there was a lawyer in the circuit, who had been at the bar so long a time, whose means were not larger. It did not seem to be one of the purposes of his life to accumulate a fortune. In

fact, outside of his profession, he had no knowledge of the way to make money, and he never even attempted it."

Lincoln was associated at the Springfield bar with many famous men, and there was a keen rivalry among them. Stephen A. Douglas, David Davis, James Shields, Edward D. Baker, John M. Palmer, Lyman Trumbull, Oliver H. Browning, Shelby M. Cullom, and others afterwards sat in the United States senate and some of them held positions in the cabinets of presidents. Others were afterwards governors of states and members of the house of representatives; others led armies during the war with Mexico and the war between the states. One of the strongest groups of men that ever gathered at the capital of a state was to be found in Springfield in those days, and Lincoln was their equal in ability and learning and the superior of many of them in the qualities that make a statesman. They recognized him as their superior on many occasions, and whether or not he was the ablest lawyer on the circuit, there was never any doubt that he was the most popular. He was always a great favorite with the younger members of the bar because of his sympathy and good-nature. He never used the arts of a demagogue; he was never a toady; he was always ready to do an act of kindness; he was generous with his mind and with his purse; although he never asked for help, was always ready to give it; and while he received everybody's confidence, he rarely gave his

own in return. Whatever his cares and anxieties may have been, he never inflicted them upon others; he never wounded by his wit; his humor was never harsh or rude; he endeavored to lighten the labors and the cares of others, and beneath his awkward manner was a gentle refinement and an amiable disposition.

For twenty-five years he practised at the Springfield bar. He was not a great lawyer according to the standard of his profession, but the testimony of his associates is that he was a good one, enjoying the confidence of the judiciary, the bar, and the public to a remarkable degree. He was conspicuous for several honorable traits, and, above all, for that sense of moral responsibility that can always distinguish between duty to a client and duty to society and the truth. On the wrong side of a case he was always weak, and, realizing this, he often persuaded his clients to give up litigation rather than compel him to argue against truth and justice.

Leonard Swett, of Chicago, for years an intimate associate, and himself one of the most famous of American lawyers, says that, "sometimes, after Lincoln entered upon a criminal case, the conviction that his client was guilty would affect him with a sort of panic. On one occasion he turned suddenly to his associate and said, 'Swett, the man is guilty; you defend him, I can't,' and so gave up his share of a large fee.

"At another time when he was engaged with

Judge S. C. Parks in defending a man accused of larceny, he said, 'If you can say anything for the man, do it, I can't; if I attempt it, the jury will see I think he is guilty, and convict him.'

"Once he was prosecuting a civil suit, in the course of which evidence was introduced showing that his client was attempting a fraud. Lincoln rose and went to his hotel in deep disgust. The judge sent for him; he refused to come. 'Tell the judge,' he said, 'my hands are dirty; I came over to wash them.' We are aware that these stories detract something from the character of the lawyer; but this inflexible, inconvenient, and fastidious morality was to be of vast service afterwards to his country and to the world. The fact is that, with all his stories and jests, his frank companionable humor, his gift of easy accessibility and welcome, he was a man of grave and serious temper and of unusual innate dignity and reserve. He had few or no special intimates, and there was a line beyond which no one ever thought of passing."

Mr. Chauncey M. Depew said, "He told me once that, in his judgment, one of the two best things he ever originated was this. He was trying a cause in Illinois where he appeared for a prisoner charged with aggravated assault and battery. The complainant had told a horrible story of the attack, which his appearance fully justified, when the district attorney handed the witness over to Mr. Lincoln for cross-examination. Mr. Lincoln said he had no testi-



mony, and unless he could break down the complainant's story he saw no way out. He had come to the conclusion that the witness was a bumptious man, who rather prided himself upon his smartness in repartee, and so, after looking at him for some minutes, he inquired, 'Well, my friend, what ground did you and my client here fight over?' The fellow answered, 'About six acres.' 'Well,' said Mr. Lincoln, 'don't you think this is an almighty small crop of fight to gather from such a big piece of ground?' The jury laughed, the court and district attorney and complainant all joined in, and the case was laughed out of court."<sup>1</sup>

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<sup>1</sup> This essay first appeared in Mr. Curtis' "The True Abraham Lincoln," published by the J. B. Lippincott Company, Philadelphia, Pa., — Ed.

THOMAS DRUMMOND.



THOMAS DRUMMOND

From an engraving copied from a photograph taken when Judge Drummond was about seventy years of age.







# THOMAS DRUMMOND.

1809-1890.

BY

STEPHEN STRONG GREGORY,

*of the Illinois Bar.*

SOMETHING of the partiality which Campbell manifests for Lord Camden may be pardoned to the biographer of Judge Drummond. He was not indeed such a conspicuous champion of popular rights as Camden; nor did he probably altogether share that great man's just appreciation of the vital importance of jury trial to free institutions. But he was a simple, honest, straightforward, true-hearted man, of sterling and unquestioned integrity, devoted to justice, as he saw it, and pursuing it with courage and undeviating loyalty. In his public and private character he illustrated all the old fashioned virtues, fidelity, truthfulness, honesty and courage; and so he commanded the respect and confidence not only of the bar but of the community in which he resided and of the people of the three great states, Wisconsin, Illinois and Indiana, comprising the Federal judicial circuit in which for many years, he presided as



the only circuit judge. There are now four federal circuit judges in the same jurisdiction.

Thomas Drummond was born at Bristol, Lincoln County, in the state of Maine, the 16th day of October, 1809. He was the eldest son of James Drummond, Jr., born at Bristol, and himself the son of James Drummond who came from Falkirk, Scotland, to this country in 1764.

Judge Drummond's mother was Jane Little, the daughter of Henry Little of Newcastle, Maine. She died when her son Thomas was eleven years of age. Judge Drummond's father was a sea captain, and well known in that capacity. Later in life he abandoned the sea and cultivated a farm at Bristol, holding various town offices and serving one term as a member of the state senate. Young Thomas was attracted to the sea having made several voyages with his father, while a child. But his father had other views and persuaded him to choose the law as his profession. He was accordingly, after pursuing his studies in the common schools of his native town, sent to Lincoln, Farmington and Monmouth Academies successively, entering Bowdoin College in 1826, and graduating in 1830 while he was still under twenty-one.

The bar of Philadelphia at that time enjoyed a very high reputation, as indeed it does at the present day. Accordingly our young graduate arranged, during that year, to pursue his studies in the office of William T. Dwight of that city. Mr. Dwight

shortly after this left the law and went into the ministry, becoming the pastor of the Payson Memorial Church of Portland, Maine. It became necessary, therefore, for Mr. Drummond to make other arrangements; and he entered the office of Thomas Bradford, also of the Philadelphia bar, completing his studies and being admitted to practice in 1833. After a brief professional experience in Philadelphia, he determined to establish himself in the west; and removed to Galena, Illinois, during the year 1835. Galena was then considered a very promising place—Chicago was not yet incorporated as a city and was regarded by most people, I think, as not likely to have such a great future as Galena. There Judge Drummond lived and practised his profession for fifteen years. That city then had an able bar. The names of its members generally, however, would not be familiar to many, except old residents of Chicago or the northern portion of the state. Some few, however, attained national reputation in public life. Among the best known might be mentioned Thomas Hoyne, afterwards for many years a leader of the Chicago bar, John M. Douglas, afterwards General Counsel and President of the Illinois Central Railway; E. B. Washburne, Congressman, Secretary of State and Minister to France; General E. D. Baker, afterwards senator from Oregon, and killed at the Battle of Ball's Bluff during the Civil War, and John A. Rawlins, the friend of Grant and his first Secretary of War.

Of Judge Drummond at this time, Mr. R. H. McClellan, a prominent lawyer, banker and citizen of Galena, in an address before the Illinois State Bar Association, spoke as follows:

Being a young man of education and culture and a well-read lawyer, he very soon secured an excellent practice. His clients were the bankers, merchants and best business men of the busy little town. He was industrious, studious and faithful to his clients, and proverbially honest and conscientious. In his legal practice at the bar he exhibited the same high devotion to duty and love of truth; the same abhorrence of fraud and chicanery which so peculiarly marked his judicial career. Although not an eloquent or graceful speaker, he was strong and argumentative, dwelling with great force and minuteness upon the strong points of his case. He was always earnest and very persistent in his advocacy—sometimes indeed almost pertinacious. As a counselor his advice was highly valued by business men, as he was regarded as honest, cautious and safe. For many years and until his appointment as judge of the United States District Court of Illinois in 1850, his high character, learning and ability caused him to be looked upon as, perhaps, the leading member of the bar of his county.

I insert this at some length because it is about all I have been able to gather, from any one who might be called a contemporary of Judge Drummond, as to this period of his life. But this estimate was not made up from personal knowledge; for Mr. McClellan did not go to Galena to live until after 1850. Still as he afterwards knew Judge Drummond and many who have been his associates at the Galena bar, this is, I presume, a not inaccurate representation of the professional and general estimate of the com-

munity as to the Judge's qualities and character. We know nothing as to his great cares, his anxieties, his hopes and fears. The life of the lawyer is filled with incident, with conflict and struggle. Yet it does not afford much, in after years, for public discussion or even narration unless it has been marked with a far more varied and interesting experience than commonly falls to the lot of even successful lawyers.

In 1840, Judge Drummond was elected to the Illinois Legislature. He served one term and it is said could have had another, but he did not desire it.

On the first day of September, 1839, he was married at Willow Springs, Wisconsin, to Delia Sheldon, daughter of John P. Sheldon, of that village. She died at Winfield on the 19th day of January, 1874.

Judge Drummond was in those days a Whig in politics; and February 19th, 1850, he was appointed by President Taylor, Judge of the District Court of the United States for the District of Illinois succeeding in that position Judge Nathaniel Pope who, it is said, in 1837 held the first Federal Court in Chicago. The District Court of the United States for Illinois was established March 3d, 1819, and Judge Pope was the first judge of that court. He was Secretary of Illinois Territory in 1818, and it was due to his active exertions that when Illinois was, in that year, admitted as a state, her northern boundary was not "drawn through the southerly bend

of Lake Michigan" in such a way as to locate the site of Chicago in Wisconsin instead of Illinois. The District of Illinois was divided March 3d, 1855 into the Northern and Southern Districts, the headquarters for the former being in Chicago and of the latter in Springfield. Of that District, Judge Samuel H. Treat was appointed the first judge; Judge Drummond thereafter holding court in the northern District of Illinois. He left Galena and took up his residence in Chicago in 1854. At this time there was no Federal circuit judge in this Circuit. Judge Drummond held both the District and Circuit courts in his district and transacted all the extensive Federal judicial business of these courts, except for such occasional assistance, in the Circuit court, as was afforded by the presence and participation, of John McLean, an associate justice of the Supreme Court then assigned as Circuit justice to this circuit. Before the District was divided Judge Drummond had often before him all the leading lawyers of the state. Among them was Abraham Lincoln. He has left on record a picture of Lincoln as a trial lawyer which has been declared by a competent observer to be better than that drawn by any one else. When his court convened to receive formal announcement of Mr. Lincoln's death, Judge Drummond, in the course of his remarks on that occasion, said:

With a voice by no means pleasant, and, indeed, when excited, in its shrill tones sometimes almost disagreeable; without any of the personal graces of the orator; without much in the

outer man indicating superiority of intellect; without great quickness of perception, still his mind was so vigorous, his comprehension so exact and clear, and his judgment so sure that he easily mastered the intricacies of his profession and became one of the ablest reasoners and most impressive speakers at our bar — with a probity of character known by all; with an intuitive insight into the human heart; with a clearness of statement which was itself an argument; with uncommon power and felicity of illustration often, it is true, of a plain and homely kind, and with that sincerity and earnestness of manner which carried conviction, he was perhaps one of the most successful jury lawyers we have ever had in the state.

Clearness, probity, sincerity; these are indeed commanding virtues in an advocate. The keen appreciation of their possession by Lincoln which Judge Drummond's language shows, reveals how fully their manifestation, in trials before him, struck a responsive chord in his own heart.

Judge Drummond became a Republican. Partisanship, as we shall see, in no wise colored his judicial action. But he supported cordially the efforts of the government in the Civil War. In 1863, on Thursday, the 9th of April, a great union meeting was held in Chicago at Bryan Hall at which he presided. In the course of a stirring appeal to the patriotic citizens of the north on that occasion he said:

It is the perpetuity of the Government that is at stake; and what a Government! Never, if man would be true to its high behests, never have the stars in their courses glittered upon so perfect a human government. Local in its action upon the rights of persons and property and upon our social and domestic relations; general with just so much power conferred, and no

more, as is necessary to create unity, and make us one of the nations of the earth. Different, and yet the same. "Distinct, like the billows, but one like the sea." . . . Can we remain unmoved by the sublime appeals which come to us from the voices of the past, and the visions of the future? Will we not here, to-night, renew our fealty to the Constitution of our Country one and indivisible—and before God and man, once more re-affirm and pledge that the integrity of this government, the union of these states, must and shall be preserved.

But while Judge Drummond expressed and undoubtedly sincerely cherished these loyal and patriotic sentiments, he nevertheless stood firmly by the Constitution against all tyrannical exercise of arbitrary power and for the maintenance of the supremacy of civil authority. I will refer to one or two illustrations of his attitude in this regard. In January, 1862, upon due application he issued a writ of *Habeas Corpus* directed to an officer in the military service of the government, and requiring him to produce one Elisha C. Jones, a man who claimed that he was in some way illegally detained as an enlisted man when in fact he never had voluntarily joined the army. The writ was served on the respondent but, on the direction of his superior officer, he ignored it. In ordering an attachment against him, Judge Drummond among other things, said:

This being so there must be a power somewhere to determine whether there has been a binding contract of enlistment or not, and that power is now vested in the Courts of the Country. It is by the great writ of right to personal liberty, that the question can be definitely decided, the *habeas corpus*. No citizen in a

proper case, should be denied this writ to test the validity of his imprisonment, even though an officer should stand in the way with a drawn sword in his hand. . . . The Courts here are loyal to the Government and to the Constitution. Juries are also loyal. There is apparently, at present, no such overwhelming necessity as would justify either the President or Congress in declaring that the life, the liberty and the property of the citizen in this community, shall be at the mercy of mere military power and authority. At any rate, I am willing to test whether this is so or not, and I shall order a writ of attachment to issue against the officer for disobeying the writ of *habeas corpus* served on him in this case.

These are brave and noble words fitly spoken. I regret that after this lapse of time I am unable to give the outcome of this case. It seems never to have been officially reported.

On many occasions during the war he participated in patriotic assemblages in Chicago, either as chairman or one of the speakers; and he supported, with unwavering courage, loyalty and devotion, the efforts of the government to bring the war to a successful conclusion. It was this unquestioned loyalty that gave emphasis and impressiveness to his attitude on a memorable occasion to which I will now refer. The bloody battle of Fredericksburg was fought on the 13th of December, 1862. It was, I think, the most signal disaster that attended upon the Union arms during the war. Our General in command was Ambrose E. Burnside of Rhode Island, a man of strong feelings but much amiability of character, who, conscious of his own incompetence so soon to



be demonstrated, had twice declined to accept the command of the Army of the Potomac and only finally undertook it upon the order of the President, which, as a soldier, he felt bound to obey. He was crushed and overwhelmed by his awful defeat and the useless slaughter of thousands of brave men for which he magnanimously admitted that he was alone responsible. He was relieved shortly afterwards and assigned to the command of the Department of the Ohio with headquarters at Cincinnati. Having made such a disastrous failure in the field, he seems to have been inspired with the fatuous idea that by carrying on with sufficient vigor, a series of harsh, unconstitutional and unlawful measures against non-combatants he might retrieve some of his lost laurels. Having caused the arrest and trial by military commission of Clement L. Vallandigham of Ohio, and been sustained by the President, he proceeded to further and more serious aggression upon the constitutional rights of the people. Under date of June 1st, 1863, Illinois being within his military jurisdiction, he issued his celebrated General Order Number 84 which, after proscribing the circulation of the *New York World* in his Department, proceeded as follows:

3. On account of the repeated expression of disloyal and incendiary sentiments, the publishing of the Newspaper known as the *Chicago Times* is hereby suppressed.

4. Brigadier-General Jacob Ammen, commanding the District of Illinois, is charged with the execution of the third paragraph of this order.

The Chicago Times was then the leading Democratic journal of the west. It was conducted by Wilbur F. Storey, a man of great force of character and of undoubted and commanding ability as a journalist, but politically and otherwise, a veritable son of Ishmael whose hand was against every man, and who was apparently quite destitute of moral principle. He had, in the Times, assailed the President, the members of his cabinet and the generals and officers of the Union forces bitterly, without regard to truth, and with a sort of fanatical and insane fury, that was well calculated to excite the indignation of all patriotic and earnest men who sympathized with the titanic struggle then in progress to avert the dissolution of the Union. He was advised on the morning of June 2d by telegram from Burnside that this order had been issued. His counsel, James F. Joy, of Detroit, and Wirt Dexter and A. W. Arrington of Chicago, at once prepared a bill in equity for an injunction and presented it to Judge Drummond late in the evening of that day. At eleven o'clock that night, Judge Drummond signed an order that General Ammen and Captain James S. Putnam, to whom some authority in the matter had been delegated, desist from the execution of General Burnside's order until the application for injunction could be heard; and he set the hearing for the following morning. At three o'clock that morning two or three Federal soldiers rode up to the Times office to see whether the order of suppress-

sion was obeyed. Every effort was made by the proprietors to complete the printing of the paper; but before the entire edition was printed two companies of infantry from Camp Douglas arrived, took possession of the office, stopped the presses and destroyed such of the printed papers as were still undistributed. When the matter was called up before Judge Drummond that morning his court room was crowded with an excited throng of people. As General Ammen was away, so he could not conveniently be served, and Captain Putnam had not been notified, the case went over until the next day. But when the matter came up before him on this occasion, Judge Drummond said:

I may say both personally and professionally I desire to give every aid and assistance in my power to the Government and to the administration in restoring the Union, in cementing once more the bond which united us together. But I have always desired, have always wished to treat the government of law as a government of the Constitution, and not of mere physical force.

At this point loud cheers rang out from every part of the Court Room. The Judge proceeded:

I trust there will be no interruption of the Court. I personally have contended, and shall always contend, for the right of free discussion and the right of commenting, under the law and under the Constitution, upon the acts of the officers of the Government. I claimed in a speech, or address, which I once made before the people of this City that I believed in that right because I thought the Constitution and the laws guaranteed that right. As an officer of the Government, I will seek to maintain that Govern-

ment, but I believe that the Constitution and the laws furnish ample means, *ample means*, to suppress this rebellion.

In concluding his remarks he said:

These parties have appealed to the Court, and the Court, so far as it is able to do so, will determine their rights of property. I trust that there will nothing occur in this community which will show a want of confidence in the civil tribunals of the country. It is desirable that we should know whether we live under a government of law or under a government simply of force. As I have already said I believe that we live under a government of law, and I trust that every citizen of this community also rests under the same belief, and that all, each one for himself, will remember that we live under a government of law.

These were simple words; but they were words of truth and courage, spoken at the right time.

Mr. S. A. Goodwin, the United States Attorney, suggested that Mr. Justice Davis be requested to sit with Judge Drummond to which all assented and he was requested to do so and attended the next day for that purpose. Meanwhile the city was in a state of the greatest excitement. A meeting of prominent citizens was held at noon in the Circuit Court room presided over by the Mayor, and by unanimous vote they requested the President to rescind General Burnside's order. This request was telegraphed the President; and Lyman Trumbull, then senator of the United States from Illinois, and Isaac N. Arnold, member of congress from Chicago, also telegraphed the President, asking his serious and prompt consideration of the matter.

This was an act of high political courage on their part. It is said that it aroused so much partisan hostility to Mr. Arnold, a most accomplished lawyer and a man of conspicuous talents and great culture, that it made his renomination for congress impossible. That evening an enormous meeting of, it is said, 20,000 people was held in the open air at Court House Square, at which resolutions were adopted denouncing Burnside's conduct, insisting on freedom of speech and of the press and that the military must be subordinate to the civil power.

The next morning Mr. Joy made his argument for complainants before Judge Drummond and Mr. Justice Davis. At its conclusion the United States Attorney suggested an adjournment to the following morning which was agreed to. During the day the news reached the city that the President had rescinded the obnoxious order; of course the case was at an end and the publication of the Times was resumed.

It can not be doubted that this act of General Burnside was a wanton, flagrant and wholly unjustifiable outrage upon the Constitutional freedom of the press. Nothing could be more destructive to liberty and free institutions than such conduct. Had it been sustained as a just exercise of national power, it would have been a lasting shame and disgrace to our country. But when the great provocation given by the offending journal is considered, the unfortunate reverses that had attended the

armies of the north, the high feeling existing between those in the north supporting the vigorous prosecution of the war and those opposing it; when we consider too that Judge Drummond was himself a Republican and a stanch supporter of the administration, it is not too much to say that, in his course in this matter, he demonstrated that courage, that independence, that fidelity to duty, that loyalty to the law which are the very highest and most commanding qualities in a judge. In this case he made a record in which any judge however distinguished might well feel a just pride. He here achieved the distinction of true greatness. And notwithstanding all that was said in most bitter and savage criticism of Mr. Lincoln for his course in the matter, that course was wise, just and extremely sagacious.

Judge Drummond's attitude on this occasion made a profound impression on the country. The legislature of the state passed unanimously a resolution thanking him and the President for their conduct in the matter; and his course was widely commended by intelligent and thoughtful men of both parties throughout the country. Let us hope that freedom of discussion and the liberty of the press are now so securely established in our great republic that they may never be hereafter seriously threatened.

In 1868 Judge Drummond removed his residence from the city to Winfield near Wheaton, the county seat of DuPage county, about twenty-five miles

west of Chicago, removing in 1888 to Wheaton where he continued to reside up to the time of his death.

On the twenty-second day of December, 1869, he was commissioned circuit judge of the seventh judicial circuit of the United States being the first incumbent of that office. Then as now this circuit embraced the three great states of Indiana, Wisconsin and Illinois; and it has probably been the scene of a greater volume of important Federal litigation than any other circuit.

At the risk of being somewhat tedious I propose now to examine somewhat briefly the decisions of Judge Drummond. They are reported chiefly in the eleven volumes of Bissell's reports.

In the case of *The Flora*,<sup>1</sup> following Judge Taney's opinion in the *Genesee Chief*, he held that the District courts of the United States had under the Judiciary Act of 1789 general jurisdiction in admiralty over all the navigable waters of the United States.

In a case as to the validity of town bonds he held them good in the hands of *bona fide* holders where authorized at an election held in due form but upon notice proceeding from the County Court instead of the Board of Supervisors, as required by law; and declared the important principle of Federal law that on questions of general commercial law Federal Courts were not bound by the decisions of

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<sup>1</sup> 1 Bissell's Reports, 29.

the Supreme Court of the state in which the transactions arose and within which these courts sit.<sup>2</sup> This case was affirmed in the Supreme Court.

In *United States vs. Illinois Central R. R.*<sup>3</sup> he held that the Lake Front Park in Chicago having been platted by an agent of the government, prior to sale of the abutting lots, as "public ground forever to remain vacant of buildings," could not be diverted to depot purposes by the railway with the consent of the city and that the government had such an interest as warranted its appeal to equity. It was this decision that made it possible for Chicago to save her Lake Front and outer harbor, concerning which much litigation arose in later years.

In *Milligan vs. Hovey*,<sup>4</sup> he held that a plaintiff imprisoned by order of a military commission, sitting in a state where the civil courts were open, might recover damages against the officers of the army responsible for this imprisonment.

He sustained the jurisdiction of the Circuit Courts of the United States over suits brought by the Government to condemn real property, holding that such proceeding was "a suit of a civil nature at common law or in equity," within the meaning of the Judiciary Act of 1789.<sup>5</sup>

Gerritt Smith sued the *Chicago Tribune Company* in the Federal Court at Chicago for charging

<sup>2</sup> *Schenck vs. Marshall County*, 1 Bissell's Reports, 533.

<sup>3</sup> 2 Bissell's Reports, 174.

<sup>4</sup> 3 Bissell's Reports, 13.

<sup>5</sup> *United States vs. Block*, 121, 3 Bissell's Reports, 208.



him with complicity in the raid of John Brown at Harper's Ferry. One plea interposed was of privilege on the ground that Smith was a public man, a writer and lecturer, and that the Tribune, as a critic of public men and affairs, published the libel complained of believing it to be true. Judge Drummond in rejecting this defense said:

It may be said here that the motive was an honest one, but I hardly think that with an honest motive a journalist has a right to proclaim to the world that a particular individual is a thief or a murderer, or that he has committed any other crime in the catalogue of crimes. The only thing that can justify that is that it is true. Under our law, if it is true, he can make it. All public men, if this were the rule, would be at the mercy of every journalist, and they could launch charges against such a man with impunity.<sup>6</sup>

One of the most important cases in the decision of which Judge Drummond participated was that of *Piek vs. Chicago & Northwestern Railway*. This was a bill filed by a stockholder in that company against the railway and others, including the railway commissioners of the state of Wisconsin, seeking a judicial declaration that the so-called "Potter Law" passed by the legislature of that state to regulate railway rates was contrary to the Federal Constitution. It was heard at Madison, in the Western District of Wisconsin, and decided July 4th, 1874, Mr. Justice Davis, Judge Drummond and Judge Hopkins, District Judge in that District,

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<sup>6</sup> 4 Bissell's Reports, 477.

*sedentibus*. It was especially interesting because it was the first of the cases involving the validity of the so-called "Granger Laws" to be heard and decided by a Federal Court.

The constitutionality of the law was sustained, Mr. Justice Davis announcing orally the views of the Court. Thereafter the opinion was filed by Judge Drummond.<sup>7</sup> On appeal to the Supreme Court, the decree in this case was affirmed.

In *Union Trust Co. vs. Rockford & R. R. Co.*,<sup>8</sup> Judge Drummond held that where a bill for a receiver is filed in a Federal court of competent jurisdiction and thereafter a similar bill is filed in a state court and in the latter proceeding a receiver is appointed before similar action is taken by the Federal court, he will be compelled to yield possession to a receiver thereafter appointed by the Federal court. Deprecating a conflict with the tribunals of the state he said:

These conflicts, of course, are always unpleasant to us. We desire to proceed harmoniously with the State Courts and State Judges. We cannot, however, shrink from duties imposed upon us, where we have once obtained jurisdiction of a case, as we think we have here. We believe that it is our duty to maintain it, according to well-settled principles.

There was a certain inflexibility in his position on such matters which it was impossible to shake.

In *Garrison vs. Chicago*,<sup>9</sup> he seems to have held

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<sup>7</sup> 6 Bissell's Reports, 177.

<sup>8</sup> 6 Bissell's Reports, 197.

<sup>9</sup> 7 Bissell's Reports, 480.

that the city had no power to make a contract with a gas company to run for a considerable term of years. His opinion in this case does not distinctly state the reasons for his decision. It seems to intimate that charter power to make such contract does not clearly appear; that to sustain it, is to hold that a city may barter away its power of police; and that if such a contract be valid for ten years it might be for fifty, one hundred, or even in perpetuity. Probably this case would not now be followed by the courts.

The first case in this country dealing with labor troubles on a railway operated by a receiver appointed in his court was *Secor vs. The Railway*.<sup>10</sup> Judge Drummond there laid down the conventional doctrine that men might work or not as they saw fit, but that they could not lawfully prevent other men from working. In the course of his opinion on a further hearing of this case, he states that the Circuit Court of the United States for that circuit then held possession of many railroads on account of their embarrassed condition, "the gross annual earnings of which amount to more than fifteen millions of dollars." This is not now a very impressive total. It meant more then—1877—than it does now. In another case<sup>11</sup> of the same character he laid down similar views, substantially holding that men may not combine to quit simultaneously the service of

<sup>10</sup> 7 Bissell's Reports, 513.

<sup>11</sup> *King vs. Ohio and Michigan Railway Co.*, 7 Bissell's Reports, 529.

a railway so as to embarrass its operation. Recent cases have modified this view and it may be regretted that in all cases where a man is charged with contempt of court in doing that which amounts to a breach of the peace or other offense against the penal code, he has not the right to a jury trial. Judge Drummond in both the cases referred to imposed sentences of imprisonment.

In *Turner vs. I. B. & W. Ry.*<sup>12</sup> he held that a court of equity operating a railroad through its receiver may require the receiver to pay claims due by the company to employes and for supplies at the time of his appointment. By analogy to lien statutes, he limited the time within which claims thus incurred should be allowed to the period prescribed by such statutes. This rule was afterwards substantially adopted in the Supreme Court of the United States.

In *United States vs. Beef Slough & Co.*<sup>13</sup> he laid down the important principle that in the absence of specific congressional legislation, the regulation of a navigable stream is left entirely with the state and the United States has no standing in equity, on bill or information, to ask that any obstruction to the navigation in such river be abated or prevented. By the river and harbor act of 1890 this rule was changed and it is understood that

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<sup>12</sup> 8 Bissell's Reports, 315.

<sup>13</sup> 8 Bissell's Reports, 421.

under its provisions the government may now maintain such bills.

This review of the recorded judicial opinions of Judge Drummond is most meager and insignificant compared with the volume of his work. Large fields of his judicial activities have not been touched. In patent and bankruptcy matters his labors were extensive and arduous. But in a sketch of this character, it is impossible to include any adequate examination of the opinions pronounced in the course of such an extended judicial career. Moreover Judge Drummond's opinions had some peculiarities which tend to render them less interesting after the lapse of time, though by no means detracting from their excellence. They were usually short, direct and compact, not at all discursive, and seldom contained much discussion of the authorities. The Federal Reporter was not established until a few years before he left the bench; and Mr. Bissell's first volume was not issued until his judicial methods and style had been fully formed.

In those happy days a Federal judge at *nisi prius* did not deem it necessary to write a treatise whenever he decided anything. So Judge Drummond's opinions were closely directed to the points at issue before him. These he stated, decided them clearly and directly, gave distinctly his reasons for his decision and then stopped. Having done this he did not deem it necessary thereafter to ramble over

the entire field of jurisprudence and comment on all other decided cases having more or less relation to the one before him. His opinions were simple and straightforward like the man.

We have been threatened, owing in part to modern facilities for reporting, I imagine, with a fearful inundation of Federal law. I think some improvement in the way of shorter opinions may now be noted although a recent Federal Reporter contains one opinion of a District Judge, on a question of law nearly forty-four pages in length. However, the Supreme Court has reversed the judgment in that case in spite of this learned disquisition, thus illustrating the proposition that long opinions by courts of first instance do not completely insure against such disasters.

I have referred to one aspect only of a field in which Judge Drummond was much engaged after he became circuit judge. After the financial panic of 1873, there were many foreclosures and insolvencies among the railways of the country. Judge Drummond during this period, through receivers, administered the affairs and conducted the operations of many railroads traversing his circuit and having an extensive mileage. In all those matters he acted with fidelity, prudence and judgment. His decisions always had a sound basis of justice and practical common sense. The interests involved were large, the questions involved were sometimes complicated and often novel. Eminent

counsel frequently appeared in such matters and presented their contentions with great force and persistence. But no matter how bitter the conflict, how difficult the questions involved, or how large the interests at stake, all felt the most entire confidence in the rectitude of Judge Drummond's purposes and the strict probity of his character, his sound learning and his strong common sense. And it was this confidence that commended his judgments to victor and vanquished alike, as the conclusions of the law upon their rights, rather than the mere personal opinion of the judge.

The extensive operations of the Whisky Ring by which enormous frauds were perpetrated on the Government centered largely in Judge Drummond's Circuit. He ruled with great firmness and inflexibility in such cases, arising out of this great conspiracy, as came before him.

I have already referred to the fact that Judge Drummond was often called on to act as chairman or to speak at public meetings. So when the Chicago Bar Association, September 25th, 1883, gave a dinner to Lord Coleridge, then Chief-Justice of England, he was naturally selected as chairman of the evening. On this occasion a friendship between him and the Lord Chief-Justice began which lasted through his life. Lord Coleridge after his return to England wrote him under date of October 10th, 1887, and referring to the bar dinner, said:

But certainly I had no finer entertainment, no more cordial and delightful evening than that at which you presided and of which you were the animating spirit.

In the same letter the Lord Chief-Justice makes some remarks upon a great question still unsettled which are not without interest.

We are watching here with intense interest the progress of the Home Rule campaign. I have myself been for years a convinced Home Ruler; not from any love of the thing itself but as what I counsel of despair. After seven or eight centuries of misrule we are now holding Ireland by means of 40,000 troops (nearly double the standing army of the Great Republic) and I want to know what is worse and more utterly discreditable to Great Britain than that? Mirabeau said and I believe he was right that the people which rebels has always just cause for rebellion and most certainly Ireland has plenty of good cause. If Gladstone was younger I should have no manner of doubt that he would carry his measure. But he is but a few weeks of 78 and that is a great age at which to count on even a year of active life.

It may well be imagined that these sentiments were not unappreciated by a man of such strong love of liberty and natural justice as Judge Drummond.

Again when in 1888 the Chicago Bar Association gave to the present Chief-Justice of the United States a farewell dinner, upon the occasion of his departure for Washington to assume those high and exacting duties which he has since discharged so acceptably, both to the bar and the people of this country, Judge Drummond presided with great dignity, animation and propriety.



When he retired from his position as circuit judge he was seventy-four years of age. His service on the Federal bench thus covered the period from 1850 to 1884. It would be the veriest commonplace to rehearse the familiar story of the growth and development of the great central west and the country at large within that period; to tell of the thousands of miles of railway spanning the continent, centering in Chicago and constructed during this time; or to recite the equally marvelous history of the Aladdin-like growth and development of the Imperial City of the west which was, for the most part, the theater of Judge Drummond's activities. All this he saw, *magna pars fuit*; so that when he retired from the bench we had no citizen more generally known, more widely trusted, more universally esteemed, than was he.

He had not achieved fortune, he had not dazzled the public by the fitful brilliancy of his achievement in any field. His position, the consideration bestowed on him by his fellows, the respect and esteem which he enjoyed were solely the triumph and recognition of character.

In 1873 he had been strongly urged by the bar of his circuit for the position of Chief-Justice of the United States, to succeed Chief-Justice Chase; and in 1876 upon the resignation of Mr. Justice Davis he was pressed by the same constituency for appointment to succeed that distinguished son of Illinois on the highest Court of the Nation.

After his retirement he lived quietly at his suburban home until his death which occurred at Wheaton, May 15th, 1890.<sup>14</sup>

In 1886 he made a European trip, and on his return was a passenger on the Oregon, the Cunard steamship which sank just off Long Island, when within a few hours of New York. On this occasion he exhibited characteristic unselfishness and courage and was one of the very last to leave the sinking vessel. Referring to this incident, Lord Coleridge said in a letter to his son after the Judge's death:

I was very glad to see that his noble conduct on board the Oregon was known and commemorated. I had a cousin on board with your father, from whom I learned of your father's conduct and words. It was no surprise to me but it deepened, if possible, my affectionate respect for him.

The tributes paid to the memory of Judge Drummond after his death by the bar of his circuit and by various organizations and individuals, were numerous and sincere. I will refer particularly but to one. The late Charles E. Dyer, formerly District Judge of the United States for the Eastern District of Wisconsin, an accomplished lawyer and an eloquent and attractive speaker, in presenting to the Federal Court at Milwaukee on June 6th, 1890, the resolutions adopted by the Milwaukee Bar Association on the death of Judge Drummond, de-

<sup>14</sup> He left two sons, Frank Drummond, who is now living on a farm near Mineral Point, Wisconsin; and James, now living in Milwaukee; and four daughters, three of the daughters who are unmarried live at Wheaton and the fourth is Mrs. John B. Farwell, Jr., of Chicago.

livered an address which in felicity of diction, beauty of thought, propriety of expression and fidelity to fact, can hardly be surpassed by anything to be found in the record of similar efforts. I regret that it can not properly be here given in full. I will make one extract:

In the highest sense Judge Drummond was a just judge and an upright man. Stone and marble chiseled into monuments can add nothing to his enduring fame. He loved justice for Justice's sake. No partialities of friendship, no considerations of policy, no exigencies of time or occasion, could ever swerve him the breadth of a hair from his sense of right. Sitting in judgment he represented, in appearance and in fact, the high-minded magistrate clothed with authority but inspired only with a desire to exercise that authority justly and impartially. When he sat upon the bench you felt that he ought to be there, and when he delivered his judgments you felt that they must be respected and obeyed. . . . He delighted in restoring to parties their just rights. He was a chancellor who loved to do equity. His Court was one where the sifting process was applied unsparingly, and if either or both of the parties had woven a web of fraud, the threads were never so fine that he did not unravel them. In condemnation of fraud he was merciless, and in upholding the right he was ardent and sometimes vehement. "What is a Court of Equity for," he once impetuously exclaimed from the bench, "except to brush such cobwebs as these away?"

This is the impression he made on the bar and on the public.

A man of undeviating integrity, uncompromising in his adherence to justice and truth as he was in his hostility to wrong and oppression, of attainments and learning adequate to his station, simple, direct

and clear-minded, and with a devotion to duty and a courage to pursue it as he saw it that never faltered; he commanded the confidence and the affection of the bar and the people of his great Circuit in the highest degree.

Judge Drummond was a man rather above the medium in height, of average weight, with blue eyes and, until age had thinned and whitened it, rather light brown hair. He habitually wore a short beard. He was frank and cordial in manner and led a natural, simple, unaffected life. In religion he was an Episcopalian and a regular attendant upon the services of that Church. He was exceedingly fond of music and the opera; and took a simple hearty interest in base ball and other wholesome outdoor sports.

In all respects he was a high and fine type of the public man of his time; a type not too familiar, even on the bench, in this day and generation. And among those of us who knew and practised before him, the memory of his sterling virtues and his exalted character will not soon pass away.























